NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

Congressional Information Service, Inc.
Washington, D.C.

CIS

OIL PLACER MINING CLAIMS IN HOT SPRINGS COUNTY, WYOMING

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1660

A BILL TO VALIDATE CERTAIN OIL PLACER MINING CLAIMS IN HOT SPRINGS COUNTY, WYOMING

NOVEMBER 24, 1981

Publication No. 97–72

Printed for the use of the
Committee on Energy and Natural Resources

U.S. GOVERNMENT PRINTING OFFICE

95-252 O WASHINGTON : 1982

S311-32

COMMITTEE ON ENERGY AND NATURAL RESOURCES

JAMES A. McCLURE, Idaho, *Chairman*

MARK O. HATFIELD, Oregon	HENRY M. JACKSON, Washington
LOWELL P. WEICKER, JR., Connecticut	J. BENNETT JOHNSTON, Louisiana
PETE V. DOMENICI, New Mexico	DALE BUMPERS, Arkansas
MALCOLM WALLOP, Wyoming	WENDELL H. FORD, Kentucky
JOHN W. WARNER, Virginia	HOWARD M. METZENBAUM, Ohio
GORDON J. HUMPHREY, New Hampshire	SPARK M. MATSUNAGA, Hawaii
FRANK H. MURKOWSKI, Alaska	JOHN MELCHER, Montana
DON NICKLES, Oklahoma	PAUL E. TSONGAS, Massachusetts
JOHN P. EAST, North Carolina	BILL BRADLEY, New Jersey
JOHN HEINZ, Pennsylvania	

MICHAEL D. HATHAWAY, *Staff Director*
CHARLES A. TRABANDT, *Chief Counsel*
D. MICHAEL HARVEY, *Chief Counsel for the Minority*

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

JOHN W. WARNER, Virginia, *Chairman*

JOHN HEINZ, Pennsylvania	SPARK M. MATSUNAGA, Hawaii
GORDON J. HUMPHREY, New Hampshire	J. BENNETT JOHNSTON, Louisiana
MALCOLM WALLOP, Wyoming	DALE BUMPERS, Arkansas
FRANK H. MURKOWSKI, Alaska	BILL BRADLEY, New Jersey

JAMES A. MCCLURE and HENRY M. JACKSON are Ex Officio Members of the Subcommittee
ROGER SINDELAR, *Counsel*

CONTENTS

	Page
S. 1660	3
Department of the Interior, letter dated November 30, 1981	36

STATEMENTS

Greve, William Jr., manager, oil and gas, legal department, Petro-Lewis Corp., Denver, Colo., accompanied by Don Profota, Michael Manning, and Gary Widman	5
Wallop, Hon. Malcolm, a U.S. Senator from the State of Wyoming	1
Warner, Hon. John W., a U.S. Senator from the State of Virginia	1

APPENDIX

History of Public Land Law Development	39

OIL PLACER MINING CLAIMS IN HOT SPRINGS COUNTY, WYO.

TUESDAY, NOVEMBER 24, 1981

U.S. SENATE,
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room 3110, Dirksen Office Building, Hon. John W. Warner, presiding.

Present: Senator Warner.

Also present: Roger Sindelar, counsel; and D. Michael Harvey, chief counsel for the minority.

OPENING STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you very much for joining us this morning. Regrettably, I was informed that Senator Wallop will not be present today. He had intended to be here, but he is involved in the Ethics Committee of which he is the chairman, and those duties precluded his presence this morning.

Likewise, Mr. Petty, Deputy Director for Management Services of BLM will not be present this morning. I can't imagine how that would be a consequence of yesterday's opening and closing of the Government, but nevertheless, those are the facts.

The hearing record will remain open until the administration's written testimony and answers to the subcommittee member's questions are received. Questions for the administration from a subcommittee member must be forwarded to the subcommittee staff not later than 2 days following the member's receipt of the administration's testimony.

We are pleased to have you here though, Mr. Greve, and apologize for the absence of my colleague. So we will now proceed with you.

At this point, I would like Senator Wallop's opening statement inserted in the record, and the text of S. 1660.

[The prepared statement of Senator Wallop and the text of S. 1660 follows:]

STATEMENT OF HON. MALCOLM WALLOP, A U.S. SENATOR FROM THE STATE OF WYOMING

Mr. Chairman, I am grateful for your expedited hearing on S. 1660. It is unfortunate that the Department of the Interior could not be here today because of constraints placed by the late passage of the continuing budget resolution. However, I

am sure it will not cause substantial delay to the committee's consideration of the bill.

I introduced S. 1660 on September 24, 1981, to provide a mechanism for validating, as though never interrupted, two "producing" oil placer mining claims which were declared abandoned by the Department of the Interior for failure of the mining claimants to file the necessary documents required by section 314 of the Federal Land Policy and Management Act. The claims, known as the east end claims 3 and 4, comprise about 304 acres of a 3,000-acre oil field acquired by Petro-Lewis Corporation April 18, 1979. When acquired by Petro-Lewis, the claims were producing a small amount of oil. The company has since invested nearly $2.5 million for new wells and for secondary recovery in the field, of which about $830,000 is directly attributable to the east end claims 3 and 4.

In considering this private relief bill, it is important to understand that oil placer mining claims are rare and unique creatures from the past. The east end 3 and 4 claims were originally located in 1917 under the general mining law of 1872—three years before Congress declared federally owned oil properties leasable under the Mineral Leasing Act of 1920. In 1976 Congress enacted the Federal Land Policy and Management Act with a record-keeping provision, requiring that the locator of mining claim of Federal lands file certain documents within definite time frames with the Department of the Interior or the claims are deemed conclusively abandoned. The initial deadline set in the act was October 22, 1979.

Petro-Lewis acquired its mining claims six months before this October 22 deadline. Petro-Lewis on the same day it acquired the claims transferred its interest in the claims to Partnership Properties Company, and was designated field operator. In ignorance of the recordation requirements, both Petro-Lewis and Partnership Properties inadvertently failed to file the required papers, and the claims were declared abandoned by the Bureau of Land Management and the Interior Board of Land Appeals. The latter decision constitutes the final decision of the Secretary of the Interior and is provided for the hearing record.

I do not believe that it was the intent of Congress in enacting the recordation provisions of the Federal Land Policy and Management Act to mandate such a harsh result. It was the purpose of the section to remove stale not producing claims and to also establish a record-keeping system. This has been a particularly difficult and chronic land management problem for all public lands subject to mining.

Clearly, equity dictates that the circumstances in which Petro-Lewis and Partnership Properties find themselves warrant special legislative relief from the unfortunate, inflexible recordation requirements of section 314 of the Federal Land Policy and Management Act. I urge this committee to favorably consider the relief I propose, giving due weight to the inadvertence of the mining claimants' failure to file, their investment, and most importantly, the true reasons behind the recordation requirements.

In closing, I would also like to offer a committee amendment to the bill to clarify the fact that Petro-Lewis' filing under the bill is for the benefit of the owner of the claim, Partnership Properties Company. The amendment consists of adding the following language to the end of line 11, page 1, "on behalf of Partnership Properties Company".

II

97TH CONGRESS
1ST SESSION

S. 1660

To validate certain oil placer mining claims in Hot Springs County, Wyoming.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 24 (legislative day, SEPTEMBER 9), 1981

Mr. WALLOP introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

---

A BILL

To validate certain oil placer mining claims in Hot Springs County, Wyoming.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) notwithstanding section 314(c) of the Federal Land Policy and Management Act of 1976 (90 Stat. 2769; 43 U.S.C. 1744(c)) and any other applicable provision of law, the Secretary of the Interior shall receive, consider, and act upon any certificate of location or notice of location covering east end numbered 3 and 4 unpatented oil placer mining claims, situated within and covering the west half of section 31, township 43 north, range 93 west, sixth principal merid-

ian, Hot Springs County, Wyoming, filed by the Petro-Lewis Corporation (hereinafter in this Act referred to as the "owner") pursuant to subsection (b) of this Act.

(b) Any certificate or notice filed pursuant to subsection (a) must be filed within sixty days of the date of enactment of this Act and shall include—

(1) a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim sufficient to locate such claim on the ground, in the office of the Bureau of Land Management designated by the Secretary of the Interior in accordance with the recordation requirements of the Federal Land Policy and Management Act of 1976 (Public Law 94–579); and

(2) all fees which are required by the Secretary of the Interior for unpatented mining claims under the Federal Land Policy and Management Act of 1976.

○

STATEMENT OF WILLIAM GREVE, JR., MANAGER, OIL AND GAS, LEGAL DEPARTMENT, PETRO-LEWIS CORP., DENVER, COLO., ACCOMPANIED BY DON PROFOTA, MICHAEL MANNING, AND GARY WIDMAN

Mr. GREVE. My name is William F. Greve, Jr. I am manager of the oil and gas legal department for Petro-Lewis Corp. and I am here today to testify on behalf of Senate bill 1660 introduced by Senator Wallop.

With me on my left is Mr. Don Profota, development manager of the Rocky Mountain region for Petro-Lewis, and on my right is Mr. Michael Manning and Mr. Gary Widman, counsel to Petro-Lewis.

We have posted on the easels to the right of the table and to the left of the table, a plat showing the location and the extent of the East Warm Springs field in Hot Springs County, Wyo.

Senate bill 1660 concerns two unpatented mining claims, oil placer mining claims, located in Hot Springs County, Wyo., which have been declared abandoned by the BLM. At the outset, I would like to make clear that the only reason we are here today is due to an inadvertent failure on the part of Petro-Lewis to make certain notification filings with the BLM under the Federal Land Policy and Management Act of 1976.

There is no issue as to whether Petro-Lewis has performed adequate assessment work on these claims.

The claims have been declared abandoned only because Petro-Lewis inadvertently did not file the required paperwork with the BLM. Oil placer mining claims are exceedingly rare, and Petro-Lewis simply did not know of the special filing requirements imposed by the Federal Land Policy and Management Act [FLPMA].

As you can see from the plats, these claims are known as the East End Claims No. 3 and No. 4, and they are part of an oilfield known as the East Warm Springs unit. When acquired by Petro-Lewis, the entire East Warm Springs field was producing a total of only 5 barrels of oil per day. In an attempt to increase production, Petro-Lewis instituted a waterflood secondary recovery project costing approximately $2.5 million on the field. Of this amount, about $830,000 was expended directly on the East End claims. It is noteworthy that Petro-Lewis was only required to spend $100 under the regulations to maintain the claims in effect.

Currently, as a result of the initial stages of the waterflood project, the field is producing 85 barrels of oil per day, approximately 85 barrels of oil per day.

If Petro-Lewis is not permitted to validate the East End claims by making the required filings, the investment may be entirely lost, and the oil they contain may never be produced. In addition, the oil in the remainder of the East Warm Springs field will become more expensive to recover.

I should emphasize that this oilfield would be producing no oil were it not for these efforts. We believe that under the circumstances, special relief is entirely appropriate.

We have submitted a statement for the record which describes the circumstances surrounding this problem in greater detail, but

95-252 O—82——2

if you have any questions, we would be glad to answer them at this time.

That is all I have, Senator.

Senator WARNER. Your entire statement will be made a part of the record.

[The prepared statement of Mr. Greve follows:]

STATEMENT FOR THE RECORD
BY PETRO-LEWIS CORPORATION

BEFORE THE SENATE COMMITTEE ON
ENERGY AND NATURAL RESOURCES,
SUBCOMITTEE ON ENERGY AND MINERAL RESOURCES
HEARING OF NOVEMBER 24, 1981 REGARDING S.1660

I. INTRODUCTION

Petro-Lewis Corporation, a domestic producer of oil and natural gas, seeks private relief from Congress to revalidate two producing oil placer mining claims located in Hot Springs County, Wyoming. Petro-Lewis is the designated operator of the oil placer mining claims of concern. Record title to the claims is held by Partnership Properties Co., a Colorado general partnership. If Petro-Lewis is granted the special relief sought, it will make the required filings as operator of the oil placer mining claims on behalf of Partnership Properties Co.

The special legislation sought by Petro-Lewis would prevent the invalidation of those producing claims which otherwise would result from the technical application of the recordation provisions of the Federal Land Policy and Management Act of 1976 ("FLPMA"). The abandonment will occur only because Petro-Lewis failed to make certain required filings under the FLPMA. We believe that a forced abandonment in

this case is inequitable, was not intended by the Congressional authors of the FLPMA, is contrary to the National interest and that these circumstances warrant special relief. H.R. 4626 would give Petro-Lewis 60 days from its enactment in which to make the required filings and thus preserve the validity of the oil placer claims.

II. STATEMENT OF THE PROBLEM

a. Description Of The Mining Claims

The claims in question are East End Nos. 3 and 4 unpatented oil placer mining claims. Together, they cover the W 1/2 of Section 31, Township 43 North, Range 93 West, 6th P.M., Hot Springs County, Wyoming ("East End Claims 3 and 4"), and are within the East Warm Springs Unit Area. The remainder of the field is covered by a Wyoming state lease. The East Warm Springs Unit Area contains 943.56 acres, of which East End Claims 3 and 4 comprise approximately 304 acres.

b. Current Legal Status Of East End Claims 3 And 4

On April 18, 1979, by assignment and conveyance effective January 1, 1979, Petro-Lewis acquired from Ashland Exploration, Inc., the working interest in the East Warm Springs Unit Area, including East End Claims 3 and 4. This acquisition was part of a package of about 3,000 lease properties acquired from Ashland Exploration, Inc. At that time Petro-Lewis was not aware of the special filing require-

ments applicable to the two oil placer claims. On the same date, effective January 1, 1979, Petro-Lewis conveyed its interest in all the properties acquired from Ashland to Partnership Properties Co. As noted above, Petro-Lewis is the designated operator of the East Warm Springs Unit Area.

When the East Warm Springs Unit Area was acquired in early 1979 from Ashland Exploration, Inc., it contained 6 wells producing a total of about 5 barrels of oil per day ("bopd"). After engineering and geological studies, Petro-Lewis determined that a secondary recovery program using the waterflood method would yield additional quantities of oil economically. Accordingly, Petro-Lewis, as operator, drilled 19 wells, and installed the necessary water injection and production support facilities at a cost of about $ 2,500,000. Prior to commencing its operations, Petro-Lewis attempted to obtain drilling permits from the U.S. Geological Survey Office ("USGS") in Thermopolis, Wyoming. At that time, the USGS indicated that it had no jurisdiction over the acreage in question, and that the well should be permitted with the state only.

In a letter dated February 4, 1981, the USGS Thermopolis Wyoming office notified Petro-Lewis of its apparent trespass in East End Claim No. 3. Petro-Lewis then advised the USGS that its operations were being conducted under a valid oil placer claim and that it would continue to conduct such operations. On March 18, 1981, the Bureau of Land Management ("BLM") Cheyenne, Wyoming State Land Office

entered a decision holding East End Claims 3 and 4 to be abandoned and void under 43 C.F.R. §3833.4(a). According to BLM's letter, this action was predicated on an examination of its mining claims records which revealed that neither East End Claims 3 or 4 were recorded in BLM's Wyoming State Office and that neither evidence of assessment work nor notice of intention to hold the claims were filed, as prescribed by the FLPMA and by BLM regulations. Petro-Lewis appealed this decision to the Interior Board of Land Appeals. Its appeal was denied on August 31, 1981. The reasoning of the Board was, if anything, succinct:

> It is irrelevant that these are oil placer claims, since FLPMA and the regulations provide no dispensation for such claims. Nor does the fact that appellants may be producing from these claims alter the result. The holding of a mining claim and the diligent pursuit of mining activities on it do not relieve an owner of the obligation imposed by statute to file required material.
>
> * * *
>
> Congress specifically placed the burden on the mining claimant to show that his claim has not been abandoned by his compliance with FLPMA's requirements, and any failure to comply produces a conclusive presumption of abandonment.

East End Claims 3 and 4 are "unpatented oil placer claims" of the type authorized by the General Mining Law of 1872. Such claims were valid if there was a discovery of a

valuable mineral deposit (in this case oil) within the limits of the claim. On February 25, 1920, the Mineral Leasing Act of 1920 withdrew oil and gas and several other minerals from the system of claims established in the General Mining Law of 1872, and thereafter made oil and gas subject to disposition only by lease. 1/ However, section 37 of the Mineral Leasing Act excepted from its coverage valid unpatented oil placer claims in existence on February 25, 1920, and thereafter maintained in compliance with the General Mining Law of 1872. East End Claims 3 and 4 were so maintained, and were valid and subsisting claims on October 21, 1976, the date of enactment of the FLPMA.

It should be noted that oil placer claims, such as East End Claims 3 and 4, are exceedingly rare so that the situation that has occurred here is likely to be unique.

c. History Of The Claims

East End Claims 3 and 4 were located on June 29, 1917. Drilling operations were commenced in 1917, and in 1918 oil was discovered within the limits of each claim. On November 10, 1924, the BLM recognized East Warm Springs as a known geological structure which included parts of East End Claims Nos. 3 and 4. 2/ At that time the field contained

---

1/ See 30 U.S.C. §§181 et seq.

2/ Specifically, the East Warm Springs geologic structure includes Lots 2 and 3, Sec. 31, T. 43N., R. 93W., 6th P.M., Hot Springs County, Wyoming. Lot 2 (SW 1/4 NW 1/4) is part of the East End No. 3 oil placer mining claim. Lot 3 (NW 1/4 SW 1/4) is a part of the East End No. 4 oil placer mining claim.

several producing wells and was owned by the Atlantic Pacific Oil Company of Wyoming.

In 1937 the Empire State Company acquired the field from Atlantic Pacific. Empire State drilled several additional wells and plugged others, operating the field until 1970. In 1965 Empire State attempted steam injection in an unsuccessful attempt to increase production.

The field was acquired in 1970 by Ashland Exploration, Inc., which began a water-injection prcject in 1974. On July 3, 1975, Ashland entered into a Unit agreement approved by the state of Wyoming. In December of 1978, Ashland terminated water injection.

Petro-Lewis assumed control of the East Warm Springs Unit in April of 1979. When Petro-Lewis took over operations, East Warm Springs was producing a total of 5 bopd out of 6 wells. Petro-Lewis studied the engineering and geological problems associated with this field and determined that by applying advanced secondary recovery techniques, it might make East Warm Springs productive, even though the less sophisticated secondary recovery efforts of both the Empire State Company and Ashland Exploration, Inc., previously had failed.

d. The Federal Land Policy and Management Act of 1976 and Relevant BLM Regulations

The FLPMA, 3/ enacted on October 21, 1976, preserved, with certain modifications, the rights of those holding

---

3/ 90 Stat. 2743, 43 U.S.C. §§1701 et seq.

claims under the General Mining Law of 1872. The provisions of the FLPMA relevant here are contained in section 314, 4/ which requires an unpatented mining claimant to file certain information with the appropriate local state office of the BLM. These provisions are implemented by regulations of the Department of the Interior, Bureau of Land Management.

For placer claims located prior to October 21, 1976, such as East End Claims 3 and 4, the FLPMA and the BLM regulations 5/ required recordation 6/ plus evidence of annual assessment work or notice of intention to hold the claim. 7/ Recordation for all unpatented mining claims was to be completed on or before October 22, 1979, 8/ and the evidence of annual assessment work or the notice of intention to hold the claim were required to be filed "on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, whichever date is sooner". 9/ These provisions were designed to invalidate stale, hard-rock mining claims that were not being worked, and to establish federal records of the active mining claims.

4/ 43 U.S.C. §1744.

5/ See 43 C.F.R. Subpart 3833.

6/ 43 C.F.R. §3833.1-2. Essentially, recordation merely identifies the existence of the claim and its location.

7/ 43 C.F.R. §3833.2-1.

8/ 43 C.F.R. § 3833.1-2.

9/ 43 C.F.R. §3833.2-1.

95-252 O—82——3

A failure to comply with these requirements within the prescribed time periods is deemed to constitute an abandonment of the unpatented mining claim. 10/

III. SPECIAL RELIEF LEGISLATION IS APPROPRIATE

a. Forced Abandonment Of East End Claims 3 And 4 Would Create A Wholly Unjustified Result Which Congress Never Intended Under FLPMA

As noted above, the investment in the East Warm Springs waterflood project to date has totaled about $2,500,000 dollars. The ultimate success of this highly risky secondary recovery project will depend in large part upon whether East End Claims 3 and 4 continue to be an integral part of the East Warm Springs Unit.

If the oil placer claims are forfeited, Petro-Lewis may have to plug and abandon the wells already drilled in the East End claims. Of the $2,500,000 expended by Petro-Lewis to develop the East Warm Springs Unit, approximately $830,000 has been expended directly in East End Claims 3 and 4. This figure includes the expenses for drilling and completing 5 wells, plugging and abandoning 5 other wells, and expenses associated with the construction and installation of injection and production support facilities attributable to the East End claims. Obviously, the investment in East End Claims 3 and 4 will be completely lost due to forced abandonment if relief is not granted.

10/ 43 C.F.R. §3833.4.

Two of the East End wells are injection wells used to inject water into the oil bearing formation in order to push the oil towards producing wells located in East End Claims 3 and 4 and in the adjacent portions of the East Warm Springs Unit Area. If those injection wells are abandoned, unnecessary additional wells may have to be drilled at substantial expense on the adjacent lands near the East End claim boundaries. As a further consequence of forced abandonment, Petro-Lewis may have to drill additional wells on adjacent lands to compensate for the loss of wells now located in the East End claims. This costly duplication of effort will make any oil recovered from the remainder of the East Warm Springs Unit Area significantly more expensive than if special relief were granted, causing premature abandonment of the field as well as foreclosing Petro-Lewis from recovering the oil underlying East End Claims 3 and 4.

More importantly, if Petro-Lewis loses control over East End Claims 3 and 4, the entire East Warm Springs project economics will be adversely impacted. While production has increased as a result of Petro-Lewis' efforts from 5 bopd to 85 bopd (for the entire unit), the results of the waterflood program so far have been inconclusive. Petro-Lewis hopes there may be further increases in production, but two prior operators of the field have failed in their secondary recovery attempts, and ultimately, there can be no assurance that Petro-Lewis will succeed in its efforts. Clearly, the loss of the East End claims makes success that

much more unlikely and substantially increases the risk of the project.

b. Forced Abandonment Of East End Claims 3 And 4 Will Result In The Production Of Less Oil And Is Contrary To The National Interest

The forced abandonment of the East End claims would probably mean that oil underlying those claims would not be produced in the near future, and perhaps not at all. Petro-Lewis might have to plug and abandon the wells now in place.

The East Warm Springs Unit is not a large oil field and its future production levels are uncertain. Today, after Petro-Lewis has drilled additional production and injection wells, and has begun water injection, production has increased from 5 bopd to about 85 bopd. This figure represents the total production for the entire East Warm Springs Unit Area, of which the East End Claims 3 and 4 are only a part. Manifestly, a separate secondary recovery operation in East End Claims 3 and 4 would be far less efficient than one which encompasses the entire East Warm Springs Unit Area. Under these circumstances, it is questionable whether a separate secondary recovery project for the East End claims would be at all feasible, and consequently, it is questionable whether the oil underlying those claims would ever be produced without the special relief sought by Petro-Lewis.

For these same reasons, - the high cost of a separate recovery project, on tracts covering only part of the field,

where there is uncertainty as to whether production will repay costs, - it is questionable whether other parties would have any substantial interest in a competitive lease offering.

Clearly, at a time when it is the policy of the United States to encourage the domestic production of oil, it would be contrary to the National interest to endanger prospects for production from any domestic source, particularly from those older fields in which no oil can be produced except by advanced and expensive techniques of secondary recovery.

c. Petro-Lewis And Its Predecessor In Interest Were Unaware Of the FLPMA Filing Requirements

Unpatented oil placer mining claims are exceedingly rare, since almost all oil production on federal lands is controlled by the Mineral Leasing Act of 1920. However, the BLM was aware of the existence of valid oil placer claims which were on file with the BLM Cheyenne State office, 11/ and BLM of course knew that its regulations would result in the forfeiture of such claims if the claim holders failed to make the required filing. While BLM was not expressly required by statute to give prior notice to Petro-Lewis of the FLPMA filing requirements, BLM notified Petro-Lewis of those requirements only after the filing deadline had passed and only after Petro-Lewis had commenced the secondary

---

11/ East End Claims 3 and 4 are, and always have been, recorded in BLM's Cheyenne State Office records. See OG Plat, Township 43 North Range 93 West of the 6th principal Meridian, Hot Springs County, Wyoming.

recovery project. While ignorance of the law is not a legal excuse, nevertheless, a serious hardship has been created by a lack of knowledge of the law. Petro-Lewis had no prior experience with oil properties of this type and was simply unaware of the special filing requirements imposed by the FLPMA.

Prior to the assignment of the claims, Petro-Lewis reviewed the files of Ashland Exploration, Inc. for title problems and found no evidence of invalidity of the claims. Under these circumstances, the FLPMA filing provisions operated as a trap even for the wary. Had Petro-Lewis been aware of the filing requirement it simply would have filed and avoided a possible forfeiture.

d. The FLPMA Filing Requirements Were Not Intended To Force The Abandonment Of Active, Producing Oil Placer Claims

Prior to enactment of FLPMA, the filing requirements covering oil placer claims were controlled by local state law and no filings were made with the BLM.

Although the legislative history of the FLPMA recordation provisions is somewhat sparse, it is clear from what is available that the statute was not intended to operate to force the abandonment of producing oil properties. The foremost purpose of the recordation provisions is to eliminate stale hard rock mining claims, not producing oil placer claims. As explained in the House Conference Report:

> Both the Senate and House Amendments provided for recordation of mining

> claims and for extinguishment of abandoned claims. 12/

The report of the Senate Committee on Interior and Insular Affairs referring the bill to the full Senate, explained:

> This recording requirement is not intended to supersede nor displace the existing recording requirements under State law. As such, its purpose is to advise the Federal land managing agency, as proprietor, of the existence of mining claims. 13/

In debate, the provision was referred to by Senator Haskell as "a very simple housekeeping measure", 14/ and Senator McClure, who criticized this provision remarked:

> I have some doubts as to whether it is necessary, but I do not believe it is . . . sufficiently burdensome, upon the claimant that we ought to avoid taking that step when there is a very clear value to the Federal Government and the

---

12/ H. Rep. 94-1724, 94th Cong., 2d Sess. at 62 (1976), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 (hereinafter "LEGISLATIVE HISTORY") Publication No. 95-99, 95th Cong., 20 Sess. at 932 (emphasis added).

13/ S. Rep. No. 94-583, 94th Cong., 1st Sess. at 65 (1975), reprinted in LEGISLATIVE HISTORY at 130 (emphasis added).

14/ 122 Cong. Rec. S 2155 (daily ed. February 23, 1976) reprinted on LEGISLATIVE HISTORY at 202 (remarks of Sen. Haskell).

> land manager in having [claims] filed in one place. 15/

The work of the Public Land Law Commission is mentioned numerous times in the legislative history 16/, and it is apparent that the recommendations of the Commission were of pivotal importance in the drafting of the FLPMA. In its report to the President, the Commission noted that stale mining claims had long been a problem. In this regard the Commission recommended:

> Congress should establish a fair notice procedure (a) to clear the public lands of long dormant mining claims and (b) to provide the holders of existing mining claims an option to perfect their claims under the revised location provisions we recommend. 17/

It is clear from the Conference and Committee Reports, from the remarks of Senators Haskell and McClure, and from the history of the recordation provisions that they were not

---

15/ 122 Cong. Rec. S 2155 (daily ed. February 23, 1976), reprinted on LEGISLATIVE HISTORY at 202 (remarks of Sen. McClure) (emphasis added).

16/ 121 Cong. Rec. S 1232, S 1242 (daily ed. January 30, 1975), reprinted in LEGISLATIVE HISTORY at 64 (remarks of Senators Haskell, Jackson); S. Rep. No. 94-583 94th Cong., 1st Sess 34 (1975) at 35, 36, 38, 39, 40, 42, 43, 44, 45, 46, 48, 50, 51, 52, 57, 65, reprinted in LEGISLATIVE HISTORY at 99, 100, 101, 103, 104, 105, 107, 108, 109, 110, 111, 113, 115, 116, 117, 122, 130; 122 Cong. Rec. S2147, S. 2148, S 2151, S 2155, S 2365, S2366, reprinted in LEGISLATIVE HISTORY at 194, 195, 198, 203, 211, 212 (remarks of Senators Haskell, Hansen, Packwood, McClure, Jackson).

17/ See ONE THIRD OF THE NATIONS LAND; A REPORT TO PRESIDENT BY THE PUBLIC LAND LAW REVIEW COMMISSION (June 1970) at 130.

intended to operate to induce the forfeiture of producing oil placer claims. Nevertheless, under the BLM regulations implementing those provisions, that is precisely what will occur in this instance.

e. Only The Congress Can Relieve Petro-Lewis Of The Unjust Impact Of The FLPMA Recordation Provisions

Having lost its appeal before the Interior Board of Land Appeals, Petro-Lewis had little choice but to seek relief from Congress. Thus, if Congress does not grant the special relief sought, the decision of the BLM Cheyenne, Wyoming State Office deeming East End Claims 3 and 4 to be abandoned will stand, with the consequences described above.

IV. CONCLUSION

The forced abandonment of the oil placer mining claims is the result of an inadvertent failure to complete the paperwork required by FLPMA. The consequences will be the production of less oil than if BLM had not deemed the claims to be abandoned and void. This draconian result is totally unjustified. It is inconsistent with the intent of Congress at the time the FLPMA was originally enacted, and it serves no policy in existence today. To the contrary, the strong likelihood, if special relief is not granted, that the oil underlying East End Claims 3 and 4 may not be produced is totally at odds with the current National policy of encouraging increased domestic production.

95-252 O—82——4

A substantial investment in advanced secondary recovery technology has been made to recover additional oil from a 60-year old field. This investment was made knowing that the secondary recovery projects of two predecessors failed. Manifestly, an investment was made at a substantial engineering and business risk, but the secondary recovery efforts have begun to show only marginal results. If secondary recovery operations continue for the entire project, rather than the more limited project which would remain following a forfeiture, the possibility of success is substantially increased. Unfortunately, as a result of the strict application of FLPMA filing provisions a forced forfeiture may result in less production of oil for the public, a result we believe was never intended by Congress. Under these circumstances, special relief is entirely appropriate, and Petro-Lewis respectfully requests this Committee to recommend S. 1660 for passage.

Appended hereto are a series of Questions and Answers intended to further clarify the circumstances surrounding East Claims 3 and 4, and Petro-Lewis' request for special relief.

QUESTIONS AND ANSWERS

Q. What exactly will S. 1660 do?

A. S. 1660 simply will allow Petro-Lewis 60 days from its enactment in which to revalidate two unpatented oil placer claims ("East End Claims 3 and 4 ") by making the filings mandated by the FLPMA and by the BLM regulations.

Q. Why is Petro-Lewis in need of this relief?

A. East End Claims 3 and 4 are "unpatented oil placer claims" acquired in early 1979 from Ashland Exploration, Inc., as part of a package of 3000 lease properties. Neither Petro-Lewis nor, apparently, Ashland Exploration, Inc., were aware that the FLPMA imposed special filing requirements on oil placer claims or that the consequence for missing the filing deadline was that such claims would be deemed abandoned and void. Oil placer claims are a type of claim established under the General Mining Law of 1872. They are exceedingly rare and Petro Lewis had no prior experience with this type of mineral interest. As a result, Petro-Lewis was unaware of the filing deadline set out in the BLM regulations. BLM declared the claims to be abandoned and void despite the fact that substantial sums were invested in a risky secondary recovery project in the field in which East End Claims 3 and 4 are located.

Q. If Congress grants the special relief requested by Petro-Lewis, will Petro-Lewis obtain something for nothing?

A. Absolutely not. Petro-Lewis will have earned every barrel of oil that it is able to recover. In the East Warm Springs field each and every barrel must literally be coaxed to the surface at great expense. Furthermore, although Petro-Lewis has been able to increase production to some extent, the results have been inconclusive and Petro-Lewis bears the risk that the project will fail completely, as have the efforts of two of Petro-Lewis' predecessors. Under these circumstances, Petro-Lewis will have earned whatever financial rewards are forthcoming, assuming that its secondary recovery project works. Furthermore, if the requested special relief is granted, Petro-Lewis' rights will be no greater than they would have been had Petro-Lewis learned of the FLPMA filing requirements and completed the required paperwork prior to the filing deadline.

Q. Is the East Warm Springs secondary recovery project considered a high risk project?

A. Yes. Two of Petro-Lewis' predecessors, the Empire State Company and Ashland Exploration, Inc., attempted secondary recovery projects in the East Warm Springs field and failed. However, after studying the geological and engineering problems associated with this field, Petro-Lewis determined that the use of advanced

secondary recovery techniques might be worthwhile. Petro-Lewis applied those techniques, investing a substantial sum of money, and to date has increased production from about 5 bopd to only 85 bopd. Petro-Lewis cannot proceed with the secondary recovery project as originally planned until the future of the East End claims is resolved. If special relief is not granted, the risk associated with the East Warm Springs project will increase substantially, and Petro-Lewis will have to re-evaluate the entire project.

Q. What is the investment in East End Claims 3 and 4 and in the East Warm Springs Unit?

A. Petro-Lewis performed extensive geological and engineering studies of the East Warm Springs field, including East End Claims 3 and 4. Subsequently about $2.5 million dollars was invested in a risky drilling and secondary recovery program. This program involved the drilling of 19 wells for both water injection and oil production, and the construction and installation of associated water injection and oil production facilities. Of the $2.5 million invested, about $830,000 is directly attributable to the East End Claims, representing expenses for 5 wells located in East End Claims 3 and 4 and expenses for the injection and production facilities supporting those wells.

Q. Did Congress, in enacting the FLPMA filing requirements, intend the result reached in this case?

A. We believe not. An examination of the Conference and Committee reports, statements of the legislators, and the Report of the Public Land Review to the Commission indicates that the FLPMA filing requirements were intended to deal with the problem of stale hard rock mining claims. We do not believe that the FLPMA filing provisions were intended to operate to force the abandonment of producing oil placer claims. Indeed, given the rarity of such claims, it was unlikely that this situation was at all in the minds of the Congressional authors at the time of FLPMA's enactment.

Q. If East End Claims 3 and 4 are abandoned, how will that affect the National interest?

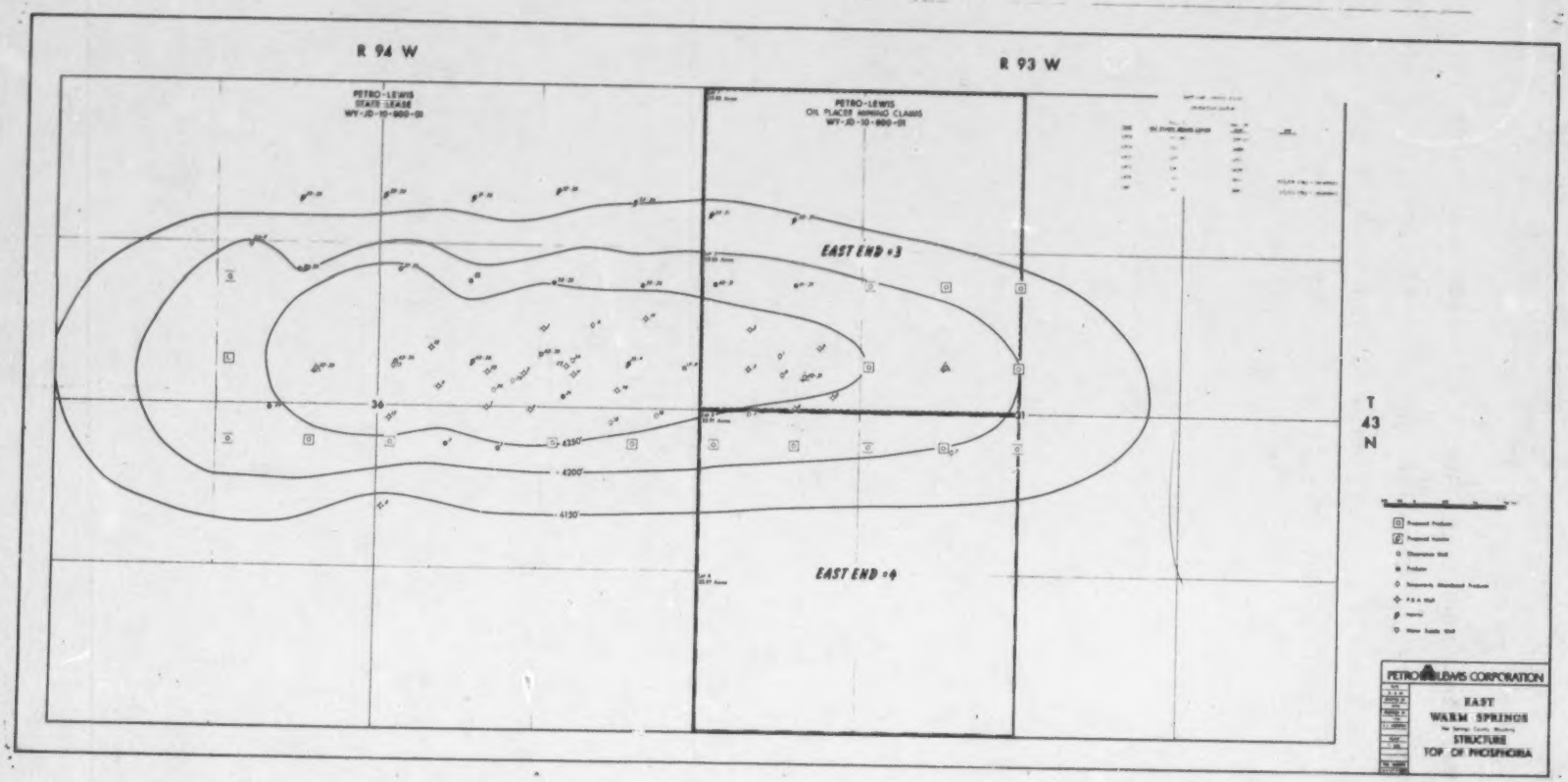
A. If special relief is not granted, and East End Claims 3 and 4 are abandoned, less oil will be recovered. The oil underlying East End Claims 3 and 4 may not be produced at all, and the oil underlying the rest of the East Warm Springs field will be more expensive to produce. Clearly, this would not be in the National interest at a time when it is the policy of the United States to encourage the domestic production of oil.

Q. Other than the original October 22, 1979, filing deadline, will Petro-Lewis have to comply fully with the FLPMA filing requirements as implemented by the BLM regulations?

A. Yes. We also will file our assessment work and pay the fees required under the regulations.

Q. Did Petro-Lewis have any alternative other than to seek relief from Congress?

A. No. Petro-Lewis exhausted its remedies before the agency by pursuing its appeal to the Interior Board of Land Appeals. In our opinion, Congress is the only available avenue of relief.


R 94 W
R 93 W
PETRO-LEWIS
STATE LEASE
WY-JO-10-800-ST
PETRO-LEWIS
OIL PLACER MINING CLAIMS
WY-JO-10-809-ST
EAST END #3
EAST END #4
36
31
4350'
4200'
6150'
T
43
N
PETRO-LEWIS CORPORATION
EAST
WARM SPRINGS
STRUCTURE
TOP OF PHOSPHORIA

FACT SHEET

Petro-Lewis seeks private legislation to revalidate two oil placer mining claims which the Bureau of Land Management declared on March 18, 1981 to be abandoned and void due to the fact that Petro-Lewis, without knowledge and through no negligence on its part, failed to make certain regulatory notice filings by October 22, 1979. Petro-Lewis has expended substantial monies in developing these properties and it should not be penalized for failure to meet certain notice requirements of which it was unaware.

On April 18, 1979, by an assignment and conveyance effective as of January 1, 1979, Petro-Lewis Corporation acquired East End Nos. 3 and 4 unpatented oil placer mining claims from Ashland Exploration Inc. Both oil placer mining claims are located in the W 1/2 of Section 31, Township 43 North, Range 93 West, 6th P.M., Hot Springs County, Wyoming, and are situate within the East Warm Springs Area Unit. Since its acquisition of East End Nos. 3 and 4 oil placer mining claims, Petro-Lewis Corporation has conducted a secondary recovery drilling program on certain lands (more particularly, on the placer claim lands as well as adjoining state lands), which include acreage within the limits of each of these claims. The secondary recovery project has required a commitment of about $3,000,000.00.

a. History of Petro-Lewis' two oil placer mining claims

East End Nos. 3 and 4 oil placer mining claims were located on June 27, 1917 and were filed of record on June 29, 1917. Field work operations commenced on the subject claims in 1917, and in 1918, a discovery of oil was made within the limits of each claim.

On November 10, 1924, the Bureau of Land Management established the East Warm Springs known geologic structure, which included Lots 2 and 3, Sec. 31, T. 43 N., R. 93 W., 6th P.M., Hot Springs County, Wyoming. Lot 2 (SW 1/4 NW 1/4) is part of the East End No. 3 oil placer mining claim, and Lot 3 (NW 1/4 SW 1/4) is a part of the East End No. 4 oil placer mining claim.

Under the General Mining Law of 1872, a placer mining claim can be validated only if there is a discovery of a valuable mineral deposit within the limits of the claim. Since a valid discovery was made on each of the East End No. 3 and the East End No. 4 oil placer mining claims prior to February 25, 1920, both claims were valid claims existent on the effective date of the Mineral Leasing Act of 1920.

95-252 O—82——5

The Mineral Leasing Act of 1920 withdrew oil and gas and several other minerals as locatable minerals under the General Mining Law of 1872, and instead made oil and gas subject to disposition only as leasable minerals. See 30 U.S.C.A. §§181 et seq. (1971). Section 37 of the Act, however, contained a savings clause that excepted from its leasing requirements valid claims existent as of February 25, 1920, and thereafter maintained in compliance with the General Mining Law of 1872. Accordingly, East End Nos. 3 and 4 oil placer mining claims were withdrawn from the provisions of the Mineral Leasing Act, and were valid and subsisting oil placer mining claims in October, 1976.

b. The Federal Land Policy and Management Act of 1976 and Relevant BLM Regulations

On October 21, 1976, the United States Congress enacted the Federal Land Policy and Management Act of 1976 ("FLPMA"). 90 Stat. 2743, 43 U.S.C.A. §§1701 et seq. (Supp. 1980). With certain exceptions, FLPMA preserved the General Mining Law of 1872, and existent rights of any locaters or claims under that act. 43 U.S.C.A. §1732(b). The most important exception to this proviso is Section 314 of FLPMA, which now requires an unpatented mining claimant to record certain information with the local state recording office and to subsequently file that information with the appropriate local office of the Bureau of Land Management. 43 U.S.C.A. §1744. These statutory claim-registration requirements were also implemented by regulations promulgated by the Department of Interior. See 43 C.F.R. Subpart 3833, originally published in 42 Fed. Reg. 5298 (Jan. 27, 1977), and subsequently amended and revised in 44 Fed. Reg. 9720 (1979) and in 44 Fed. Reg. 20428 (1979).

Section 1744(b), 43 U.S.C.A., requires a lode or placer mining claimant to file a copy of the official record of the initial certificate or notice of location of the mining claim, including a description sufficient to locate the claimed lands on the ground, with the appropriate local BLM office. In the case of claims that were located before October 21, 1976, the filing of the initial certificate or notice of location must have been accomplished within the three-year period following October 21, 1976. The amended regulations further elaborated upon this requirement to require the owner to complete the filing on or before October 22, 1979. 43 C.F.R. §3833.1-2(a)(1979).

For unpatented lode and placer mining claims located prior to October 21, 1979, FLPMA and the regulations also obligated the owner to file evidence of maintenance of his claim with both the local recording office and the appropriate BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the year in which the initial certificate or notice of location was recorded with the BLM. 43 U.S.C.A. §1744(a); 43 C.F.R. §3833.2-1(a). The annual claim-maintenance filing requirement is satisfied by the filing of either an affidavit of annual assessment work performed on the claim or a notice of intention to hold the mining claim. 43 C.F.R. §3833.2.

43 U.S.C.A. §1744(c); 43 C.F.R. §3833.4(a) provide that failure to comply with any of these filing and recordation requirements within the prescribed time period shall be deemed to constitute an abandonment of the unpatented mining claim. The regulation gratuitously adds that the mining claim shall be void.

Both Petro-Lewis Corporation and its predecessors in interest apparently failed to file a copy of the official record of the certificate of location for East End Nos. 3 and 4 oil placer mining claims with the BLM on or before October 22, 1979, as required by Section 1744(b), 43 U.S.C.A. and 43 C.F.R. §3833.1-2(a).

c. Recent Rulings of the USGS and BLM

In a letter dated February 4, 1981, the United States Department of the Interior's Geological Survey Office in Thermopolis, Wyoming, notified Petro-Lewis Corporation of its apparent trespass in Lot 1, Sec. 31, T. 43 N., R. 93W., 6th P.M., Hot Springs County, Wyoming, by drilling two wells within the lot. Lot 1 is within the limits of the East End No. 3 oil placer mining claim.

By letter dated February 11, 1981, Petro-Lewis Corporation advised the Geological Survey Office in Thermopolis, Wyoming that its operations on the land in question were being conducted under a valid oil placer mining claim identified as the East End No. 3 oil placer mining claim, and that it will continue to conduct operations on the said lands.

On March 18, 1981, Marla B. Bohl, Chief of the Lands and Mining Section, State Land Office, Bureau of Land Management, Cheyenne, Wyoming entered a decision, which determined that East End Nos. 3 and 4 oil placer mining claims are deemed abandoned and void under the authority of 43 C.F.R. §38833.4(a). This action was predicated upon an examination of that office's mining claims records, which revealed that neither the East End No. 3 nor the East End No. 4 oil placer mining claims were recorded in the Bureau of Land Management's Wyoming State Office in the manner and within the time limits prescribed by FLPMA and the regulations, and further that neither the evidences of assessment work nor notices of intention to hold the claims required under 43 C.F.R. §3833.2 have been filed in support of the claims.

d. Mitigating Circumstances Which Justify Private Relief

There were producing wells on both the NW/4 and SW/4 Sec. 31 at the time it was conveyed to Petro-Lewis. Considerable time was spent following the acquisition in assimilating and studying the properties involved, East Warm Springs being only a very small part of the Ashland acquisition. Early in 1980 the decision was made to implement a full scale waterflood project with the addition of 14 producing wells and 6 injection wells to the existing facilities. Drilling commenced late in 1980 and the wells were completed and operational early this year at a total commitment cost of nearly $3,000,000. Six injectors were added to the W/2 Sec. 31.

Petro-Lewis presently plans to undertake additional drilling in the field starting approximately October 1, 1981.

Prior to the acquisition, Petro-Lewis' personnel went to Ashland's offices in Houston to review Ashland's files for title problems and to assist in preparing the conveyances. Petro-Lewis had never before owned or administered a placer mining claim and, to the best of our knowledge, these were the only placer mining claims owned by Ashland. Indeed, very few oil placer claims exist today because, to qualify for such status, the claim would have to be in production prior to the Mineral Leasing Act of 1920. The Mineral Leasing Act withdrew oil and gas as locatable minerals under the General Mining Law of 1872 and made such minerals subject to disposition by lease. However, Section 37 of the Mineral Leasing Act contained a savings clause that excepted from its leasing requirements all valid claims

existing as of February 25, 1920. East End Nos. 3 and 4 oil placer mining claims were so maintained and were valid and existing claims as of the effective date of FLMPA. At the time Petro-Lewis acquired the claims from Ashland, there was nothing in Ashland's files to indicate that it knew of the Federal Land Policy and Management Act or would have made the necessary filings had it not conveyed these claims to Petro-Lewis.

Equally important, the Bureau of Land Management never mailed any notices to claimants regarding the necessity of these filings. However, the BLM did possess actual knowledge that the oil claims existed and were in production. Prior to and during the FLPMA filing period, the Cheyenne State Office of the BLM was aware, and remained aware, of the existence and continuing validity of the mining claims in question. The claims had been noted on their records and a serial number (W-31045) had been assigned to them. Petro-Lewis missed the FLPMA filing date simply because it had no knowledge of the statute or the filing requirements. The Company had no prior experience with oil placer claims.

Finally, unless private relief is granted, less oil may be recovered from the properties upon which the secondary recovery operations are located because Petro-Lewis will have to abandon operations on that portion which represents the oil placer mining claims. In addition, if the properties are deemed abandoned, any oil recovered from the placer claims lands will be more expensive due to the fact that some third party would have to institute secondary recovery operations at some future point in time. Alternatively, the cost of secondary recovery operations which are limited to lands covered by the two oil placer claims simply may not be economic and therefore the oil may go unrecovered.

ENGINEERING REPORT

Since November of 1980, nineteen (19) wells have been drilled in Sec. 31 and Sec. 36 in the East Warm Springs Field located in Hot Springs County, Wyoming, at an average D&C cost of $90.529/well. Five (5) of these wells have been drilled in Sec. 31 and fourteen (14) in Sec. 36. The Water Injection Facilities and Production Handling Facilities have all been built on Sec. 36 due to the necessity of having these facilities centrally located. A summary of monies spent for the development of this field along with expected recoverable reserves is attached.

In order to maximize recoverable reserves per dollar spent, it is essential that these two sections be treated as one homogeneous field as Petro-Lewis is now doing, under our Water Flood Development plan. As can be seen on the East Warm Springs Field map, all presently operable and future wells are drilled on an orderly pattern which has been selected to drain the field as efficiently as possible. Once the Field is fully developed, more wells dispersed throughout the entire field will be turned into water injectors for the purpose of pushing the oil into the producing wellbores. If operations in Sec. 31 are shutdown, the desired effect of pushing the oil towards the producers into the wells in Sec. 31 and also into the eastern most wells of Sec. 36 will be lost. Furthermore, in order to produce all of the recoverable oil attributable to Sec. 36, we would need to drill additional wells along the lease boundary line of Sec. 36, all at a significant expense.

Therefore, to maximize recovery and to minimize present and future dollars spent per recoverable barrel of oil, it appears that present waterflood operations as are now being conducted by Petro-Lewis would be the optimum plan of development of the East Warm Springs Field.

SEC. 31 DEVELOPMENT COSTS

D&C (5 Wells)	$ 465,920
P&A (5 Wells)	23,145
Electrical	36,765
Injection	19,437
Production	21,603
Tank Battery	17,022
Road Work	3,224
6-31 (Well Repair)	7,629
TOTAL	$ 594,745

Senator WARNER. Are there other persons present today who desire to contribute to this record?

Mr. GREVE. No, sir.

Senator WARNER. I see a phalanx of very capable and competent people who have gotten up early to come here. Mr. Tucker, your presence is for what purpose? There are no cameramen.

Mr. TUCKER. I do not have a statement, Senator Warner.

Senator WARNER. Will you each identify yourselves so at least we know who each of you are?

Mr. PROFOTA. Senator, my name is Don Profota, the development manager for Petro-Lewis.

Senator WARNER. Would you care to say anything this morning?

Mr. PROFOTA. No, sir.

Senator WARNER. Thank you. And you, sir?

Mr. MANNING. Senator, my name is Michael Manning and I am counsel to Petro-Lewis.

Senator WARNER. We are glad to have you, counselor.

Mr. WIDMAN. Gary Widman, also counsel for Petro-Lewis.

Senator WARNER. This was a special hearing at the request of Senator Wallop, and as I explained he had a situation which precluded his coming and I will work with him in the resolution of this matter. I thank you for coming and your patience and we will look forward to hearing from the administration on this bill, and their communication will be made an official part of the record.

Thank you.

Mr. GREVE. Thank you for your kind consideration.

Senator WARNER. We are adjourned.

[Whereupon, at 9:10 a.m., the hearing was adjourned.]

[The Department of the Interior's letter dated Nov. 30, 1981 follows:]

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

NOV 30 1981

Honorable James A. McClure
Chairman, Committee on Energy
And Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Your Committee has requested the views of this Department on S. 1660, a bill "To validate certain oil placer mining claims in Hot Springs County, Wyoming."

S. 1660 would require the Secretary of the Interior to accept a certificate of location or notice of location covering two oil placer mining claims on certain lands in Hot Springs County, Wyoming, notwithstanding the provisions of section 314(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), if filed by the Petro-Lewis Corporation within 60 days of enactment of S. 1660.

We would have no objection to granting some relief to Petro-Lewis Corporation if Congress finds relief is merited. However, we do not believe that S. 1660 is the appropriate form of relief or that it will accomplish what Petro-Lewis is seeking. We, therefore, suggest that the bill be amended along the lines discussed below.

These are the facts that generated introduction of the bill:

East End Nos. 3 and 4 are unpatented oil placer mining claims originally located in 1917, before passage of the Mineral Leasing Act of 1920. They were exempted from the Mineral Leasing Act by section 37 of that Act (43 U.S.C. 193) and therefore have been treated as mining claims since their original location.

Section 314 of FLPMA requires owners of unpatented mining claims to file a certificate or notice of location in the appropriate Bureau of Land Management office on or before October 22, 1979, if the claims were located before October 21, 1976. The mining claims in question fall within that category. However, Petro-Lewis and its predecessors in interest failed to file the required notice or certificate. The Wyoming State office of the Bureau of Land Management, in a decision dated March 18, 1981, held the claims abandoned. On appeal by Petro-Lewis, the Interior Board of Land Appeals affirmed that decision on August 31, 1981.

The effect of S. 1660 would be to waive the filing deadline and permit the Bureau to accept the necessary certificate or notice for recordation as timely if Petro-Lewis files within 60 days of enactment. Although the bill does not specifically say so, we assume Petro-Lewis would also be required to meet other reporting requirements of section 314 of FLPMA.

A problem with S. 1660 is that even if the default in filing is overcome by enactment of S. 1660, the claims might still be under a cloud. The bill does not address the larger question of the validity of the claims.

In any event, we believe a more equitable approach would be to develop a bill which would permit Petro-Lewis to have the right to mine but also would protect the public interest in the minerals.

We recommend that S. 1660 be amended to direct the Secretary of the Interior, on application by Petro-Lewis, to issue a non-competitive lease to Petro-Lewis with a requirement for payment of a 12 ½ percent royalty. The bill should also provide that Petro-Lewis not be considered in trespass for any actions it has taken on the two tracts in question prior to the enactment of this legislation and the issuance of the lease.

We will be happy to work with committee staff on appropriate language of amendment or on drafting a clean bill.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Garrey E. Carruthers

Assistant SECRETARY

BEST AVAILABLE COPY

APPENDIX

HISTORY OF PUBLIC LAND LAW DEVELOPMENT

History of Public Land Law Development

Written for the Public Land Law Review Commission
by
Paul W. Gates
with a chapter by
Robert W. Swenson

Washington, D.C. November 1968

Part 2
The Fuel Minerals Legislation

The fact that Congress was unable to deal effectively with the fuel-mineral lands in the public domain will not come as a surprise to anyone familiar with the history of the mining legislation discussed in Part 1 of this chapter. For a period of 56 years the fuel minerals were handled by piecemeal legislation which, for the most part, failed to consider the whole range of policy problems involved in the disposal of fuel resources. The coal-land acts and the Executive withdrawals of coal lands during the Theodore Roosevelt administration will be considered first. This will be followed by a discussion of the oil placer law and the withdrawals of petroleum land which led to the enactment of the Pickett or Withdrawal Act of 1910. Finally, there will be an account of the legislative history of the Mineral Leasing Act of 1920, the first significant deviation from the "free-mining" and "sale" policy of the mining acts of the 19th century.

Sale of the Coal Lands

The first coal act of 1864[180] opened with a recital that the coal beds or coal fields as "mines"[181] had been expressly excluded from the operation of the Preemption Act of 1841.[182] The act then empowered the President to sell these lands at public auction to the highest bidder at a minimum price of $20 per acre in "suitable legal subdivisions." Any lands not thus disposed of were subject to private entry at the minimum price under the general public land statutes. In the following year,[183] a new statute restricted sale of unreserved land to bona fide coal miners who were engaged in actual mining on the public lands in tracts not exceeding 160 acres (according to the legal subdivisions of the government survey) at a minimum price of $20 per acre.

Eight years later, in 1873,[184] the Congress provided that a citizen (or one who indicated an intention to become a citizen) might enter any quantity of *vacant* and *unreserved* coal lands of not more than 160 acres, described according to the government survey. An association of individuals was permitted to enter a 320-acre tract. The minimum price was $10 per acre for land located more than 15 miles from a completed railroad and $20 per acre for land located within 15 miles. Persons in actual possession of coal mines were given preferential rights. An association of not less than four persons could obtain as much as 640 acres if they had expended not less than $5,000 in work and improvements. Section 6 of the act provided that it should not be construed to "authorize sale of lands valuable for mines of gold, silver or copper."

The 1873 Act continued to be the basic legislation for the disposal of coal lands until 1920. Section 6 established what was to become the fixed policy to regard the coal lands as *sui generis*. This should be contrasted with the free-mining policy which Congress had applied since 1866 to the western mines valuable for the precious metals.[185] The reason for distinguishing

[180] 13 STAT. 343 (1864). For general discussions of the coal legislation, see HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 518-25 (1924) (1965 reprint); ROBBINS, OUR LANDED HERITAGE 223, 346, 370-71 (1960).

[181] According to 1 LINDLEY, MINES § 140 (3d ed. 1914), the land department did not treat coal lands as mineral lands prior to the 1864 Act.

[182] 5 STAT. 453 (1841).

[183] 13 STAT. 529 (1865).

[184] 17 STAT. 607 (1873), superseded by the Mineral Leasing Act of 1920, 30 U.S.C. § § 181 et seq. (1964 ed.).

[185] See Part 1, "A Closer Look at the Mining Act of 1866."

BEST AVAILABLE COPY

between coal and the precious metals is not entirely clear. In all probability, the coal lands were more readily discoverable and were, therefore, thought to have a greater potential for raising revenue. Moreover, in exposing the coal lands to sale in 1864, Congress was acting much as it had only a few years earlier when it authorized the sale of land valuable for copper and iron ore.[186] Whatever justification there may have been for the sale of coal land in 1864, it is clear that the policy became obsolete within a relatively short period of time. The coal lands were to become a major national issue in the first decade of the 20th century. In the interim, a few special mining statutes which applied to nonmetalliferous deposits were enacted. The Building Stone Act of 1892[187] made land chiefly valuable for building stone subject to entry under the placer law. The oil lands in 1897[188] and the saline lands in 1901[189] were similarly made subject to placer locations.

The Conservation Period. In the 19th century our great natural resources—water, land, forests, minerals—were regarded as virtually inexhaustible. In the minds of most Americans, conservation was, therefore, an irrelevant concept. It is true that some inroads were made on the prevailing philosophy by the creation, for example, of the forest reserves and a few national parks,[190] but it was not until the Theodore Roosevelt administration after the turn of the century that a real breakthrough came about. In rapid succession, the new administration proposed to control the Federal grazing lands, to increase the national forests, to withdraw the coal, oil, and potash lands from sale, to reserve waterpower sites, and to reclaim the desert under the Reclamation Act of 1902. Gifford Pinchot, James R. Garfield, W. J. McGee, and others dramatized the conservation movement to the public until by the end of the Roosevelt administration it had become an accepted national policy, grudgingly accepted by many, of course, but nonetheless the country—even the West—knew that there was no turning back to the haphazard public law of the previous century.

During the first decade, the furor over the creation of the national forests somewhat eclipsed the Roosevelt program of mineral conservation. Although less has been written about this aspect of the general conservation movement than about water and forests, the politics behind coal and oil provide one of the most fascinating chapters in the history of the public domain. It is not the purpose here to assess

[186] See Part 1, "The Period of Sale."

[187] 27 STAT. 348 (1892).

[188] 29 STAT. 526 (1897), superseded by the Leasing Act of 1920, 30 U.S.C. § § 181 et seq. (1964 ed.).

[189] 31 STAT. 745 (1901).

[190] Although Congress authorized the President to withdraw land for forest reserves (later called "national forests") as early as 1891 (26 STAT. 1103), no administrative machinery was adopted to supervise these lands until 1897. 30 STAT. 34 (1897). During the Theodore Roosevelt administration, more than three times as much timberland was withdrawn as had been set aside in previous administrations. As part of the conservation movement, the Forest Service of the Department of Agriculture was set up in 1905. 33 STAT. 628 (1905). See Note, 60 YALE L. J. 456 (1951). In 1907, the opponents of conservation attached an amendment to the agricultural appropriation bill, which provided that the President could not set aside additional national forests in the six northwestern states. Unable to veto the bill, Roosevelt set aside 16 million acres of forest land in these states 2 days before he signed the bill. ROOSEVELT, AN AUTOBIOGRAPHY 404-5 (1913) (1924 reprint). The extent to which this action rankled members of Congress is illustrated by the fact that as late as 1910 a section was added to the Pickett Act limiting withdrawals for national forests.

Beginning in 1872 (Yellowstone, 17 STAT. 32), 28 national parks have been created by acts of Congress. Withdrawals were made to carry out the provisions of these statutes. It is probable that the President has an "implied" power to establish national parks. A 1950 Act forbade any further extension or establishment of national parks in Wyoming. 64 STAT. 849 (1950). On mining locations in national parks, see 1 AMERICAN LAW OF MINING 526-30 (Martz ed. 1960).

the real objectives of the Pinchot-Roosevelt conservation program. Whether it was part of the total drive against monopoly or whether it was motivated by a sincere desire to obtain the most effective utilization of resources is a matter over which historians have disagreed. Donald C. Swain points out that the two objectives were not always compatible.[191] In any event the political aspects, at least, involved a life and death struggle between the West and the science-oriented eastern conservationists.

The Coal Land Withdrawals. In 1906 Theodore Roosevelt was seriously concerned with the administration of the Federal coal lands in the West. The Oregon timberland fraud had only recently been uncovered,[192] and there were more than rumors of abuses under the coal laws. The acreage limitations in the 1873 statute were generally acknowledged to be an impediment to the effective development of certain types of coal fields. The result was that many coal and railroad companies sought to evade these limitations either by dummy entries or by entries processed under the agricultural land statutes. An Interstate Commerce Commission hearing in Salt Lake City in 1906 uncovered many such "fraudulent" entries,[193] and in Wyoming, the Federal officials brought suit against the Union Pacific Railroad and a number of coal companies which were charged with evading the 1873 Act.[194]

The President and the Interior Department undoubtedly considered the possibility of a sweeping withdrawal of the coal lands from entry under all the public land acts. The probable reaction of Congress to such a move was not exactly an "imponderable" at the time. Nevertheless, on June 20, 1906,[195] Senator Robert M. LaFollette of Wisconsin sent up a trial balloon. He proposed a concurrent resolution to the effect that the Secretary of the Interior be requested to investigate the coal, lignite, and oil deposits of the United States and to report to Congress on the extent of, and the least wasteful methods of mining, such deposits. He also proposed that the President be authorized to withdraw from entry and sale all lands which in the judgment of the Director of the Geological Survey contained these minerals. The preamble recited that this was necessary to prevent private corporations from acquiring a monopoly in the coal lands and to conserve the supply of these minerals for the benefit of the whole people. When Congress did not respond, the Senator apparently sought out the more sympathetic ear of the President. Beginning on July 26 and continuing through November 12, 1906, the Acting Secretary of the Interior, at the request of the President, issued orders withdrawing from all forms of entry approximately 66 million acres of land where "workable coal is known to occur."[196] The land involved

[191] See Swain, *Federal Conservation Policy 1921-1933*, 76 UNIV. CAL. PUB. IN HIST. 1, 5 (1963). The author refers to Bates, *Fulfilling American Democracy: The Conservation Movement 1907 to 1921*, 44 MISS. VALLEY HIST. REV. 29 (1957); and HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY, THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959).

[192] See Callaghan, *Senator Mitchell and the Oregon Land Frauds* 1905, 21 PAC. HIST. REV. 255 (1952).

[193] 41 CONG. REC. 4666 (1907) (Remarks of Mr. Lacey).

[194] LARSON, HISTORY OF WYOMING 378-79 (1965) (2d printing 1966).

[195] 40 CONG. REC. 8763 (1906).

[196] The original order as well as the two modifications mentioned in the text appear in 41 CONG. REC. 2614 (1907) (remarks of Rep. Mondell). The estimates as to the number of acres withdrawn vary considerably. The figure in the text is taken from the reliable source, PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 69 (1951). Other extensive withdrawals occurred between 1907 and 1909, but "for the most part these were only from entry under other than the mineral land laws." PEFFER, 108. Peffer concludes that these later withdrawals were designed to protect prospectors from entries under the Homestead, the Desert Land, and the Building Stone Acts of land suspected of containing oil.

was located in the States of Colorado, North Dakota, Montana, Oregon, Washington, Utah, Wyoming and the Territories of New Mexico and Alaska. On December 17, these withdrawal orders were modified so as to preclude these lands "from coal entry merely." A further modification on January 15, 1907, provided that the withdrawals did not impair any rights acquired in good faith under the coal-land laws as of the date of the withdrawals.

Twenty years later the leading commentator on the oil-lands issue described Roosevelt's coal withdrawals as "spectacular, dramatic, and really shrewd and effective."[197] The congressional reaction, however, was less than enthusiastic.[198] Without explaining his coal-land withdrawals, the President in a special message to Congress on December 17, 1906, summarized his view of the problem:[199]

> The present coal law limiting the individual entry to 160 acres puts a premium on fraud by making it impossible to develop certain types of coal fields and yet comply with the law. It is a scandal to maintain laws which sound well, but which make fraud the key without which great natural resources must remain closed. The law should give individuals and corporations, under proper government regulation and control, (the details of which I shall not at present discuss) the right to work bodies of coal large enough for profitable development. My own belief is that there should be provision for leasing coal, oil and gas rights under proper restrictions.

At this date, it seems clear that the President's primary concern was that the coal-lands act impeded the development of the vital fuel minerals by encouraging fraudulent entries under other public land statutes of land primarily valuable for coal.

Representative Frank W. Mondell of Wyoming launched a vitriolic attack on President Roosevelt's coal withdrawals on February 8, 1907.[200] Years later, Mr. Roosevelt described Mondell as "a Congressman who took the lead in every measure to prevent the conservation of our natural resources" and "who consistently fought for local and private interests as against the interests of the people as a whole."[201] Be that as it may, it is clear that Mondell's arguments, though highly legalistic, were competently presented, and the questions which he raised were precisely the ones considered by the Supreme Court 8 years later. His statement was essentially an attack on the legality of Executive withdrawals. He maintained that the Property Clause[202] of the Federal Constitution conferred the power to dispose of the public domain on Congress, not on the Executive. He then classified previous Executive orders which had been upheld as follows: (1) those made pursuant to express legislative authority; (2) withdrawals made for the purpose of carrying out the terms of certain congressional grants, *e.g.*, grants-in-aid to railroads; and (3) reservations made for public purposes under no specific authority of Congress but under the general power vested in the President to administer the government. He concluded that the coal withdrawals did not fall within any of these categories because their purpose was not to set aside specific land for a public purpose but rather to suspend the operation of land laws which Congress had previously adopted. Representative Lacey of Iowa, on the other hand, contended that the with-

[197] Ise, The United States Oil Policy 310 (1926) (2d printing 1928).

[198] On Dec. 13, 1906, the House passed a resolution requesting the Secretary of the Interior to list all lands withdrawn since July 1, 1906, and to state reasons for the withdrawals. 41 Cong. Rec. 354 (1906) (Rep. Mondell's resolution), 4665 (1907). See also 40 Cong. Rec. 9665 (1906). Later, as evidence of the antagonism to the Interior Department, a bill was introduced in the Senate creating a public land court which had appellate jurisdiction over the Interior Department land decisions. 41 Cong. Rec. 2076 (1907).

[199] 41 Cong. Rec. 450 (1906) (House); 41 Cong. Rec. 2077 (1907) (Senate).

[200] 41 Cong. Rec. 2614-19 (1907).

[201] Roosevelt, An Autobiography 363, 393 (1913) (1924 reprint).

[202] U.S. Const. art IV § 3 cl 2.

drawals were made for the purpose of proposing new legislation on the coal lands. Mondell also vigorously attacked the conservation policy of the Interior Department as "paternalistic" and as "state socialism."

On February 13, 1907,[203] Roosevelt sent another message to Congress in which he urgently recommended legislation on the coal lands. In contrast to his earlier message, he stressed primarily the need for conservation of the remaining mineral fuels in the public domain, not only to prevent waste but also in order to reserve a portion of the remaining coal resources for future generations. He felt that "mineral fuels, like the forests and navigable streams, should be treated as public utilities." He recommended that the most effective way to deal with this resource would be to enact "such legislation as would provide for title to and development of the surface land as separate and distinct from the right to the underlying mineral fuels in regions where these may occur, and the disposal of these mineral fuels under a leasing system on conditions which would inure to the benefit of the public as a whole." Although he did not specify the details of such legislation, he felt the system should be administered in the "spirit of generosity" which had characterized our earlier disposition of the public lands. After noting that 30 million acres of coal fields had already passed into private ownership, he suggested that legislation of the type he proposed would give the Congress ample opportunity to determine how the two systems—private ownership and public leasing—operating side by side actually worked. As a concession to the states' rightists, whom he said were justifiably interested in the rapid development of the "lusty young commonwealths," he ventured that the leasing system could be administered with the "least possible" interference by the Federal government.

[203] 41 Cong. Rec. 2806-8 (1907).

In the second session of the 59th Congress, a number of bills providing both for severance of surface and minerals and for leasing were introduced by Senator Hansbrough (North Dakota),[204] Representative Volstead[205] and Senator Nelson (Minnesota),[206] Representative Lacey (Iowa)[207] and Senator LaFollette (Wisconsin).[208]

Doomed by the lethargic attitude of Congress toward the coal problem, all of these bills failed to survive referral to the Public Lands Committees of the two Houses. Roosevelt and his successor continued, however, to withdraw coal lands. The effect of a general withdrawal was to give the government an opportunity to classify the land. Land found to be valuable for coal might then be sold under the coal acts for more than the minimum price prescribed in the 1873 Act. Robbins points out that between 1906 and 1909 public coal lands sold for $75 to $100 per acre.[209] Between August 21, 1907, and November 1, 1909, 4,165,542 acres were segregated, but as Peffer points out these were mainly to protect bona fide oil prospectors from those who were attempting to obtain coal lands under the agricultural land laws.[210] By March 4, 1909, half of all the withdrawn coal lands had in fact been restored to entry.[211] This indicates the great difficulty the government experienced during this entire period with the process of classification. In retrospect, the coal lands problem was undoubtedly a relatively minor crisis, since between 1873 and 1910, only 3,806 coal land entries, totalling 544,244.92 acres were actually made.[212] During these years,

[204] 41 Cong. Rec. 489 (1906).
[205] 41 Cong. Rec. 630 (1907).
[206] 41 Cong. Rec. 611, 1788 (1907).
[207] 41 Cong. Rec. 1246, 2492 (1907).
[208] 41 Cong. Rec. 1485 (1907). It was this bill which was singled out for criticism by Rep. Mondell in his famous statement.
[209] Robbins, Our Landed Heritage 346 (1960).
[210] Peffer, The Closing of the Public Domain 108 (1951).
[211] *Id.*

the so-called "fraudulent entries" under the nonmineral acts were always a troublesome problem, of course, and these are not reflected in the above statistics on coal-land entries. Entries allegedly in violation of the coal acts touched off one of the most famous political controversies in the first years of the Taft administration. The Ballinger-Pinchot feud, culminating in 1909-10, resulted in a bitter congressional investigation and has had repercussions in the politics of conservation far beyond the specific coal lands involved.[213]

Since 1907 Roosevelt had advocated a system which would permit agricultural entries on withdrawn coal lands provided the minerals were reserved to the United States. Experience had embarrassingly revealed that a great deal of valuable agricultural land in the West was underlain with coal and phosphate. In 1907 Roosevelt announced to Congress that experience in other countries of the world had proved that coal mining and agriculture need not be mutually exclusive.[214] To a considerable extent, this was a concession to western politicians, and on the last day of his term, he signed an act permitting severance.[215] The statute provided that a good faith entryman under the nonmineral laws of land *later* classified as valuable for coal might nevertheless receive a patent to the surface, subject, however, to a reservation of the coal to the United States with a right to prospect for and mine the coal. In the early days of the Taft administration, this act was liberalized so as to permit entry under the nonmineral land acts even after withdrawal or classification as coal land.[216] The entryman must, of course, comply with the requirements of the nonmineral law under which his entry was made and, again, he could receive only a limited patent. A saving clause also authorized a limited patent to good faith entrants on classified land prior to the effective date of the act. The reserved coal deposits remained subject to disposal by the government. The act also contained provisions for adjusting problems arising between the owner of the surface and the owner of the minerals. A 1914 statute permitted new patents to be issued where the land was later classified as noncoal after a limited patent had been given by the government.[217]

Throughout the first 15 years of the new century there were several statutes applicable to the coal lands in the Territory of Alaska. In 1900 the coal-land laws were extended to Alaska, [218] but since the 1873 Coal Act contemplated sales in governmental subdivisions, the act could have no practical effect because the territory remained largely unsurveyed. To remedy this, a 1904 statute extended coal locations to unsurveyed land in Alaska, the locations to be set off in rectangular tracts containing 40, 80, or 160 acres "with north and south boundary lines run according to the true meridian" and described with reference to natural or permanent artificial monuments.[219] A 1908 Act provided that persons locating coal lands prior to November 12, 1906 (or pursuant to instructions issued by the Secretary of the Interior on May 16, 1907), might consolidate their locations by including in a single claim not more than

[213] 1 INTERIOR DEPARTMENT, ANNUAL REPORT 120 (1910).

[214] Details may be found in MOWRY, THE ERA OF THEODORE ROOSEVELT 1900-1912 250-59 (1958); PINCHOT, BREAKING NEW GROUND (1947); Ganoe, *Some Constitutional and Political Aspects of the Ballinger-Pinchot Controversy*, 3 PAC. HIST. REV. 323 (1934); Richardson, *The Politics of Conservation: Crusades and Controversies*, 70 UNIV. CAL. PUB. IN HIST. (1962). See also note 219, *infra*.

[215] Note 208, *supra*.

[216] 35 STAT. 844 (1909), 30 U.S.C. § 81 (1964 ed.).

[217] 36 STAT. 583 (1910), 30 U.S.C. § § 83-85 (1964 ed.).

[218] 38 STAT. 335 (1914), 30 U.S.C. § 82 (1964 ed.).

[219] 31 STAT. 658 (1900).

[220] 33 STAT. 525 (1904). Under this act, the famous Cunningham claims involved in the Ballinger-Pinchot controversy were cancelled in Andrew L. Scofield, 41 I.D. 176, 240 (1911).

2,560 contiguous acres of coal land.[220] A further provision invalidated any combinations in restraint of trade. Apparently no patents were issued under the 1908 Act.[221] The result was that no coal lands were developed in Alaska from the date of the general withdrawal order on November 12, 1906,[222] until 1914. At that time, the earlier statutes were repealed and leasing was authorized for the first time in Alaska.[223] The statute will be considered in connection with the public land history of the oil laws.

The Petroleum Lands

We are inclined to associate oil in the United States with the famed strike at Titusville, Pennsylvania, in 1859 when "Colonel" Edwin L. Drake, an erstwhile railroad conductor who took over a defunct oil company, pumped oil from a depth of 69½ feet.[224] What proved to be the first commercial well in this country was so unexpected that one of Drake's assistants, a blacksmith called "Uncle Billy," was compelled to fill every whiskey barrel in town with the "black gold."[225] At the outset, the well produced around 1,000 gallons of oil a day. It is said that the price of $20 per barrel at this time created a boom comparable to the California gold rush.[226] Although this may be something of an exaggeration, the decade which followed was characterized by frenzied prospecting and wild investments in oil companies.

Although crude oil was originally valuable for the production of a high-grade illuminant, lubricating oils were also discovered as a joint product. The demand for crude oil in the last 2 decades of the 19th century led to extensive oil development in areas of the United States which had long since passed into private ownership. It began in Pennsylvania and New York and progressed from there to the southeastern states, to Ohio and Indiana, then to Texas and the mid-continental states. The great Texas well in the Spindletop district in 1901 spouted oil 160 feet high and produced from 5,000 to 100,000 barrels daily—and, lacking Uncle Billy's presence of mind, it was 10 days before they saved any oil! Spindletop introduced a new era[227] in private oil development, the history of which has been carefully recorded by John Ise.[228]

Turning, however, to the public domain states, the California history is particularly interesting.[229] Although there was early experimentation in the 1850's in extracting gas for illumination from asphaltum, also used extensively for the paving of streets, there was little oil activity in California until the mid-sixties when a group of speculators, spurred on by the excitement in Pennsylvania, purchased an immense quantity of land in southern California (Ventura). One of the promoters, John B. Church, prevailed upon his brother-in-law, Benjamin Silliman, Jr., then a distinguished scientist at Yale University, to report on the potential for oil in this area. Testing samples of seepage which had been given him by Church, Pro-

[220] 35 STAT. 424 (1908).

[221] 2 LINDLEY, MINES 1148 (1914). For an example of an application cancelled for fraud, see United States v. Munday, 222 U.S. 175 (1911).

[222] The date of the general withdrawal order. See Circular, 35 I.D. 572 (1907).

[223] 38 STAT. 741 (1914).

[224] Even the lease under which Drake drilled is legendary. See WILLIAMS, MAXWELL AND MEYERS, CASES ON OIL AND GAS 141 (2d ed. 1964).

[225] Dolson, *Sitting on a Gusher*, 10 AMERICAN HERITAGE 65, 71 (February 1959).

[226] 11 ENCY. OF THE SOCIAL SCIENCES 439 (1954 reprint).

[227] See MCKAY AND FAULT, TEXAS AFTER SPINDLETOP (1965).

[228] ISE, THE UNITED STATES OIL POLICY 310 (1926) (2d printing 1928).

[229] The best account of early oil companies in the West is WHITE, FORMATIVE YEARS IN THE FAR WEST: A HISTORY OF STANDARD OIL COMPANY OF CALIFORNIA AND PREDECESSORS THROUGH 1919 (1962).

fessor Silliman issued a report which was unbelievably optimistic. His samples, it later turned out, contained kerosine imported from the East. The corporations, organized by Church and his associates and financed widely by eastern investors, failed to discover a single well capable of producing oil commercially, and the resulting scandal ruined Silliman's professional career. Other companies reported small findings during this period, and some refineries were organized to experiment with distilling local crude oil in the hope of finding a high-grade lubricant. These efforts were for the most part failures.

Oil fever was revived in the mid-seventies when several wells were put down in Pico Canyon near Los Angeles. During the next 15 years much of the prospecting was for the first time on land in the public domain. Oil mining districts, similar to those in the early gold fields, were organized. In the early 1890's oil was discovered near Coalinga, Fresno County, and in 1892 E. L. Doheny drilled the first successful well in Los Angeles. The famous "Blue Goose" was brought in in Coalinga in 1897. The Whittier and Ventura County fields were being exploited, and a new discovery was made in the famous well on Means Ranch near Bakersfield. Ise has summarized the oil development during the first years of the 20th century:[230]

> Many of the iniquities of our national oil policy have been illustrated in California history. First, there was the tendency to over-production, where offset wells are necessary to protect holders of leases, regardless of the demands for oil, or the price at which it could be sold ... In the second place, there was the consumption of oil for low uses, particularly for fuel. In the third place, there was the constant struggle of independents against monopoly control.

The Placer Laws. The legal aspects of oil mining on the public domain must begin with the Placer Act of 1870.[231] Although it is unlikely that Congress had petroleum in mind when it enacted the Placer Act, the statute was broad enough to include oil: "all forms of deposit" except veins of quartz or other rock in place. There was early authority that the quoted phrase included anything recognized by the standard authorities as mineral.[232] In 1883, Secretary of the Interior Teller, however, felt that whether the placer law applied to oil lands was "an undetermined question."[233] The Department continued to assume tacitly that oil lands were locatable.[234] This position was abruptly changed in 1896 in the *Union Oil Co.* case[235] in which the Secretary announced that land containing petroleum was not locatable as a placer mine. His legalistic, though "unscientific," analysis is worth preserving:

> It is true, scientifically speaking, that petroleum is a mineral. But the same may be said of salt and of phosphates, and of clay containing alumina, and other substances in the earth. Yet it does not follow that they come within the meaning of the mineral statutes ... It would seem as if oil was regarded by science as a mineral only because of its inorganic character, as a sort of distinction from a vegetable product.

The *Union Oil Co.* case was later reversed by Acting Secretary Ryan who conceded the long standing policy of the Department, and felt that "the demands of simple justice would seem to require that there should be no departure from that construction at this late day ..."[236] Despite the reversal, efforts to secure remedial legislation were already underway. Although two early bills were introduced by Senator White,[237] the bill which really bore fruit was H.R. 9606, introduced by Representative Mondell, who, it will be remembered,

[230] Ise, *supra* note 228, at 91-92.

[231] See Part 1, "The Placer Act of 1870."

[232] See, *e.g.*, W. K. Hooper, 1 I.D. 560 (1881).

[233] Downey v. Rogers, 2 I.D. 707, 709 (1883).

[234] Roberts v. Jepson, 4 I.D. 60 (1885); Piru Oil Co., 26 I.D. 117 (1893).

[235] 23 I.D. 222 (1896). See also 24 I.D. 183 (1897).

[236] Union Oil Co., 25 I.D. 351 (1897).

[237] 29 CONG. REC. 395, 540 (1896).

actively opposed the later coal-lands withdrawals.[238] The Mondell bill was replaced by S. 3551 (Senator Clark), and after its prompt passage in the Senate, was approved in the House in 1897 after very little debate.[239] Apparently its main purpose was to clarify the 1896 Interior ruling. The 1897 Act provided simply that petroleum lands might be entered and patented under the placer laws. A savings clause permitted patenting of land previously "filed upon, claimed, or improved as mineral, but not yet patented . . ."[240]

It is unfortunate that Congress did not review the problems presented by petroleum mining when the Placer Act was before it in 1897. The act proved to be unworkable in three respects.[241] In the first place, by applying to oil lands what was essentially a law for the mining of metalliferous minerals, the act perpetuated the rule that the prospector acquired no legal right to be protected in his occupancy prior to an actual discovery. But oil in the West, at least, could be found only after expensive equipment for drilling had been brought upon the land and a reservoir had been tapped, activities which to say the least could not be conducted in a clandestine atmosphere. The result was that as soon as there were rumors of oil prospecting, there converged on the scene countless "professional" entrymen whose nuisance value had to be reckoned with. Holders of military bounty warrants, railroad indemnity rights, and forest lieu rights could not be prevented from harassing prospectors because no one could demonstrate that the land was actually valuable for minerals at that time. It is true, in later years, that the oil operator was afforded some protection against this assortment of nonmineral claimants when many of the local courts relaxed the traditional rules applicable under the *possessio pedis* doctrine.[242] Secondly, in requiring the performance of annual assessment work, the oil prospector was encouraged to mine even though there was no immediate prospect for a market. Third, the acreage limitations of the Placer Act were regarded by everyone as too small to permit efficient mining. The result was that dummy entrymen were constantly used to avoid these restrictions.

Oil Land Withdrawals. From time to time after 1904, the land department withdrew from agricultural entry a substantial amount of land thought to be valuable for oil in California, Louisiana, Oregon, and Wyoming. The purpose was more to protect oil prospectors than to conserve the supply of oil for the public. Much of this land was in fact restored to entry at the insistence of the agricultural claimants. By 1909 the public had become accustomed to exaggerated accounts of the vast supply of oil in the West, and in that year, the Director of the Geological Survey reported to the Secretary of the Interior that the western oil lands were passing into private ownership so rapidly that this vital resource would soon disappear. "After that, the government will be obliged to repurchase the very oil that it has practically given away . . ."[243] It was suggested that immediate action be undertaken to conserve a supply of petroleum for the government's own use. The recommendation was approved by the Interior Department, and on September 27, 1909, President Taft, without advance warning, issued the following proclamation:[244]

Temporary Petroleum Withdrawal No. 5

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accom-

[238] See note 201, *supra*.

[239] 29 CONG. REC. 874, 1240, 1314, 1394, 1408-1409, 1466, 1470, 1762.

[240] 61 STAT. 526 (1897).

[241] See Ise, *supra* note 228, at 286.

[242] The cases are discussed in 1 AMERICAN LAW OF MINING § 1.26 (Martz ed. 1960).

[243] See United States v. Midwest Oil Co., 236 U.S. 459, 466-67 (1915).

[244] *Id.* at 467.

panying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination

Over 3 million acres of land valuable for oil in California and Wyoming were affected by the order. Some of the land had previously been withdrawn from agricultural entry; some had in fact already passed into private ownership and could not, therefore, be affected by the order. As to land previously withdrawn, the order simply converted these lands into withdrawals from *all* forms of disposition.

The withdrawal order must certainly have been President Taft's most audacious official act, for he was most cautious in matters of constitutional law.[245] His lingering doubts as to the constitutionality of his action stemmed from the fact that the Federal Constitution empowered Congress, not the President, to make rules and regulations respecting the property of the United States. Roosevelt and Taft were in basic disagreement on the role of the Chief Executive in the administration of the public domain.[246] Although the issue may seem relatively mild today, the historical importance of this matter of constitutional law must not be underestimated. It loomed large in the background of all the Roosevelt withdrawals, and congressional peevishness is evidenced in the action curbing the Presidential withdrawal power for national forests in 1907 and 1910.[247] It continued to be one of the most hotly debated subjects in the 6 years or so which followed the Taft withdrawals.

The Pickett Act. In a message to Congress on January 14, 1910, President Taft stated:[248]

> The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statutes would be detrimental to the public interest, is not clear or satisfactory. This power has been exercised in the interest of the public, with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions. Unfortunately, Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now, by a statute, to validate the withdrawals ... and to authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise.

In line with President Taft's suggestion, Representative Pickett of Iowa introduced H.R. 24070 3 months later.[249] As one of three so-called conservation measures,[250] the bill empowered the President to withdraw public lands from location, settlement, filing and entry in two situations: (1) for examination and classification; and (2) for the purpose of recommending new legislation to Congress respecting the with-

[245] Nine years later, with the benefit of hindsight, Senator La Follette could remark, "Taft's opinion upon constitutional matters does not appeal to me and ... ought not to have any weight with anybody else." 58 CONG. REC. 4747 (1919).

[246] ROOSEVELT, AN AUTOBIOGRAPHY 362-63 (1913) (1924 reprint): "As to all action of this kind there have long been two schools of political thought .... The course I followed, of regarding the executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service, was substantially the course followed by both Andrew Jackson and Abraham Lincoln. Other honorable and well-meaning Presidents, such as James Buchanan, took the opposite and, as it seems to me, narrowly legalistic view that the President is the servant of Congress rather than of the people, and can do nothing, no matter how necessary it be to act, unless the Constitution explicitly commands the action. . . . My successor in office took this, the Buchanan, view of the President's powers and duties."

[247] See note 190, *supra*.

[248] 45 CONG. REC. 621-22 (1910).

[249] 45 CONG. REC. 4510 (1910).

[250] The others included the act to permit surface entries on coal lands (36 STAT. 583 [1910]) and a reclamation act. 36 STAT. 835 (1910).

drawn land. The Secretary of the Interior was required to report withdrawals to Congress, and all prior withdrawals were ratified and confirmed "as if originally made under this act." Mr. Mondell of Wyoming, who only a few years earlier had so vigorously opposed Roosevelt's coal-land withdrawals,[231] reported the bill favorably out of the Public Lands Committee of which he was Chairman. Mondell argued for the bill with a certain amount of conviction. Coming as it did from one who was certainly no arch-conservationist, this may seem to be a strange change of heart. John Ise has suggested that Mondell may not have made as great a concession to conservation as it would seem.[232] There was, it is true, a "joker" in the bill. Although ostensibly authored by Pickett, Mondell most certainly was not one to accept legal advice from anyone, and presumably he had something to do with the drafting. The controversial clause provided that after withdrawn land was in fact classified, the land was then "restored to appropriation and disposition under the laws applicable thereto." All other types of withdrawals, however, were to remain in force until revoked by the President or by Congress. The act of classification thus automatically returned withdrawn land to disposition under the applicable public land acts. The President was not given a free hand to "lock up" the public domain by making withdrawals for classification. The effect of the provision was to minimize what generally seemed to be a most expansive gesture to the Chief Executive.

Ignoring for the most part the "joker" in the bill, Mondell addressed himself in the debates primarily to the withdrawal power of the Executive. In a most disarming fashion, he admitted that:[233]

> . . . we must recognize this fact, that in the country at large public sentiment was behind President Roosevelt, and has been behind President Taft, and that the principal complaints that have been made ... have been not that there was too much withdrawal, but that there was not enough withdrawal, or that there was too much restoration.

Representative Martin of Colorado objected that under the bill vast amounts of public land might be tied up for 10 or 15 years, awaiting classification.[234] Robinson of Arkansas felt that congressional ratification after a withdrawal should be made mandatory, and he generally favored overhauling all public land laws.[235] Several Congressmen objected to the report of the minority of the Public Lands Committee which offered two amendments protecting bona fide claimants who had initiated claims prior to the withdrawal. They felt this amendment would enable a number of fraudulent entries to go to patent.

The House eventually passed the bill,[236] rejecting the two amendments and others introduced from the floor. The House was pro-conservation at the time, and the bill met with opposition only from southern Democrats and a few westerners.

A substitute bill was offered in the Senate by the Public Lands Committee[237] and by the time of its passage,[238] the House version was unrecognizable. Numerous amendments were made on the floor. The arguments pro and con were the same tirades the Senate had heard since 1906. Some distrusted or favored the bill because they thought it would restrict the President's withdrawal power.[239] Others thought it confirmed a power which did not exist.[240] Senator Bailey of Texas favored turning the public lands over to the

[231] See note 201, *supra*, and text.
[232] Ise, *supra* note 228, at 314.
[233] 45 Cong. Rec. 4644 (1910).
[234] 45 Cong. Rec. 4644 (1910).
[235] 45 Cong. Rec. 5055 (1910).
[236] 45 Cong. Rec. 5103 (1910).
[237] 45 Cong. Rec. 6880 (1910).
[238] 45 Cong. Rec. 8580 (1910) (context of bill as passed by Senate).
[239] See, *e.g.*, 45 Cong. Rec. 7461-62 (1910) (Remarks of Mr. Nelson).
[240] 45 Cong. Rec. 7538 (1910) (Remarks of Mr. Clark).

states.[261] Senator Heyburn of Idaho opposed all conservation legislation as "socialistic."[262] And so on. Although the "debates" occupy considerable space in the *Congressional Record*, there was really little interest in the bill. The East had already decided how to vote, and the western opposition bored everyone else to the point where only 19 votes on both sides could be garnered to vote on one particular amendment.[263] The House reluctantly concurred in the Senate bill[264] and on June 25, 1910, it was signed by President Taft.[265] To many conservationists it was totally inadequate.[266] To the western oil operators it was something of a victory.

The bill introduced by Representative Pickett was hardly a model of legislative drafting. Although it may have been less effective as a conservation measure, the Senate version which passed was more carefully constructed. Yet, the act did leave unanswered a number of problems. In the first place, in recognizing an Executive withdrawal power, it carefully avoided any confirmation of the legality of previous withdrawals: ". . . this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act . . ." The validity of prior withdrawals was, therefore, left up to and finally decided by the courts. But the act went beyond this. It authorized the President in the future to "temporarily" withdraw at his discretion land from the operation of the general public land acts for the following purposes: waterpower sites, irrigation, classification of lands, or for "other public purposes" which were required to be specified in the withdrawal orders. The word "temporarily" has no special significance because a later sentence provided that any withdrawal or reservation should remain in force until revoked by the President or by Congress. The "joker" in the original bill—that classification automatically amounted to a restoration of withdrawn land—was omitted.[267]

The withdrawn lands were not, however, completely removed from the land laws. They continued to be open to "exploration, discovery, occupation and purchase" under the mining laws so far as the latter applied to minerals other than coal, oil, gas and phosphates. In 1912, the latter provision was changed to permit location for "metalliferous minerals."[268]

As a concession to oil operators, the act also provided that persons, who in good faith occupied oil and gas land at the date of any future withdrawal and who were diligently performing work leading to a discovery and so continued, would not be prejudiced by the withdrawal. This clause proved to be one of the great headaches in the 10 years which followed. Homesteads were excepted from the act to a limited extent, and, opening up an old wound,[269] it was provided that forest reserves could not be created in the future in six named states.

After several years of squabbling about the usurpation of congressional power over the public domain by Executive withdrawals, Congress did have the opportunity in 1910 to wrestle the entire conservation program from the control of the President. It showed no inclination to do so. This can only be a reflection of the general sentiment in the country which was unsympathetic to the attitude of Congress toward conservation in the previous decade. Rep-

[261] 45 CONG. REC. 7542 (1910).

[262] 45 CONG. REC. 8042 (1910).

[263] 45 CONG. REC. 7552 (1910) (Mr. Clark's amendment for automatic restoration of withdrawn lands).

[264] 45 CONG. REC. 8673 (1910).

[265] 45 CONG. REC. 9119 (1910).

[266] It was frequently said to be a "reservation" rather than a "conservation" measure. See Peffer, *supra* note 210, at 118.

[267] See note 252 *supra*.

[268] 43 U.S.C. § 141 (1964 ed.).

[269] See note 190, *supra*.

resentative Mondell's statement, quoted above, must certainly have been an astute political observation.

After the passage of the Pickett Act, the 1909 petroleum withdrawal was ratified and confirmed by the President on July 2, 1910, under the authority of the new act. In the decade which followed, substantially all of the unappropriated public domain was withdrawn from nonmetalliferous location under the mining laws. In order to conserve an adequate supply of oil for the Navy, two naval reserves were established by Executive order in 1912: No. 1 located in Elk Hills and No. 2 in Buena Vista Hills, Kern County, California. The theory seemed to be that the most effective way to conserve oil for the future use of the Navy was to keep it stored in the ground. These withdrawals were followed in 1915 by the Teapot Dome Reserve No. 3 near Casper, Wyoming (9,581 acres); in 1916 by the naval oil shale reserves in Colorado and Utah (132,028); and in 1923 by the extensive Reserve No. 4 in Alaska.

After 1910 land known to be valuable for metalliferous minerals was rarely the subject of a withdrawal order. Undoubtedly this was because the Pickett Act itself provided that withdrawn land continued to be subject to mining location. One exception occurred in 1912, when 9,787 acres were withdrawn in the Warren mining district in Bisbee, Arizona.[270] Investigation by the United States Geological Survey had revealed the possibility of deepseated deposits of copper ore, which were not susceptible to surface discovery so as to comply with the Mining Law of 1872. The Interior Department felt that before expensive drilling or deep shafting could occur, attempts would be made to obtain title to the land by means of state selections or other nonmineral entries. Accordingly, the land was simply withdrawn from nonmineral entries. Much of it was later restored. This is the only known situation in which hard mineral locators were protected in their prospecting from agricultural or other nonmineral entrymen.

The constitutionality of the original withdrawal in 1909 by President Taft was finally tested 6 years later in *United States v. Midwest Oil Co.*[271] After the Interior Department had concluded that the order was valid,[272] the government instituted suit to recover public land occupied by the defendant oil company in Wyoming and to obtain an accounting for oil which allegedly had been illegally appropriated. The land in question had been entered 6 months after the withdrawal order, and, after a discovery of oil, the defendant had filed a location certificate and extracted oil. Judge John A. Riner of the Federal District Court for Wyoming sustained the defendant's demurrer, holding that the withdrawal was void.[273] Astonishing as it may seem for a matter of such importance, the trial judge's opinion was handed down orally from the bench.[274] Even the Circuit Court of Appeals did no more than to certify certain questions to the Supreme Court, which then ordered the entire record sent up for review. The importance of the legal issue is apparent from the fact that several *amici curiae* filed briefs. Among them were Messrs. Pillsbury and Sutro of San Francisco, longtime counsel for Standard Oil of California. As a matter of fact, Mr. Sutro had quite consistently after 1909 advised his client that it should proceed on the assumption that the withdrawal order might be upheld.[275]

[270] 1 ANNUAL REPORT, DEPARTMENT OF THE INTERIOR 432 (1913).

[271] 236 U.S. 459 (1915), discussed in Colby, *The New Public Land Policy With Special Reference to Oil Lands*, 3 CAL. L. REV. 269, 276-85 (1915); 1 AMERICAN LAW OF MINING 79-80 (Martz ed. 1960).

[272] *In re* Lowell, 40 L.D. 303 (1911).

[273] A contemporary decision holding that the 1909 order was invalid is United States v. Midway Northern Oil Co., 216 Fed. 802 (S.D. Cal. 1914).

[274] See Colby, *supra* n. 271 at 277; 1 LINDLEY, MINES 440, n. 83a (1914).

[275] See White, *supra* note 229, at 438.

BEST AVAILABLE COPY

since the Pickett Act was not directly in-
.ved the issue was confined to the validity
the 1909 withdrawal. After the case was
ice argued, Justice Lamar delivered the
inion of the majority upholding the
ler. Justice McReynolds, who had only
ently come from the office of the At-
ney General, did not participate. There
s a vigorous dissenting opinion by Jus-
e Day. This was concurred in by Justices
.n Devanter and McKenna, whose votes
:ne as no surprise since they were from
yoming and California, the only two
.tes affected by the withdrawal.

The majority opinion was reluctant to
:ack the real issue, for it opened with the
sclaimer: "We need not consider
ıether, as an original question, the Presi-
nt could have withdrawn from private
quisition what Congress had made free
ıd open to occupation and purchase."[276]
then noted that prior to 1910 at least
2 Executive orders making reservations
r various purposes had been issued with-
ıt prior statutory authorization from
ongress. In all these Congress had simply
quiesced, and since "government is a
actical affair intended for practical
en,"[277] the Court felt that Congress had
ıpliedly consented to the practice.[278] The
.ssent pointed out that previous decisions
stained specific withdrawals had in-
olved situations in which Congress either
ad already approved a policy of dedicat-
ıg the specific land for the purpose for
hich the withdrawal was made or had
lopted conflicting policies which necessi-
ted emergency administrative action to
clarify the ambiguity. The two opinions
actually reflect a basic disagreement as to
the role of the Chief Executive.

It was clear from the terms of the Pickett
Act that it had no retroactive effect[279] and
could not, therefore, be regarded as ratify-
ing the 1909 withdrawal. Still, it is likely
that the act did influence the decision of
the Court to some indeterminable extent.
There seemed to be no question but that
the Pickett Act itself was valid.

In the *Midwest Oil* case, the Court noted
that the majority of the Senate Committee
on Public Lands felt that the Pickett bill
"operated to restrict the greater power al-
ready possessed"[280] by the President. The
question thus raised was not, however, be-
fore the Court and has not been answered
to the present time. On the one hand, it
has been argued that the act superseded
the power which the President was held to
have in the *Midwest* decision (the "implied
consent" power). If it was an all-inclusive
codification of the authority delegated to
the President in this area, any withdrawal
would necessarily have to be in accordance
with the terms of the 1910 statute. On the
other hand, if it merely supplemented the
right which already existed, withdrawals
could be made either under the act or un-
der the implied powers of the President.
The choice of the type of withdrawal
would determine whether the land with-
drawn remained open to location for
metalliferous minerals. In 1941[281] At-
torney General Robert H. Jackson ruled
that there were, indeed, two legal bases
for withdrawals: the implied power and

[275] 236 U.S. at 469.

[276] *Id.* at 472.

[277] The *Midwest* case was similarly explained in
.oux Tribe of Indians v. United States, 316 U.S.
17, 326 (1942). Judicial hostility to Executive ag-
ression by no means ended with the *Midwest* case,
owever. See Youngstown Sheet & Tube Co. v.
awyer, 343 U.S. 79, (1952). Mr. Justice Frank-
rter, concurring, did not feel that the *Midwest*
ase was persuasive on the issue presented in the
teel Seizure Case.

[278] A proviso in sec. 2 states: "That this and the
preceding section shall not be construed as a recog-
nition, abridgment, or enlargement of any asserted
rights or claims initiated upon any oil or gas bear-
ing lands after any withdrawal of such lands made
prior to June 25, 1910." 36 STAT. 847 (1910).

[279] 236 U.S. at 482-83.

[280] Withdrawal of Public Lands, 40 OPS. ATT'Y.
GEN. 73 (1941).

BEST AVAILABLE COPY

the Pickett Act.[283] His opinion was based in part on the theory that this had been the construction placed on the act by the Chief Executive and the Interior Department since 1910, an interpretation which had been acquiesced in by Congress. The theory of the *Midwest* case was thus employed to determine the scope of the Withdrawal Act. Add to that the congressional acquiescence in the Attorney General's construction since 1941 and you have a rule that is not likely to be overturned by the Supreme Court at this late date.[283] Most writers have gone along with this interpretation of the Pickett Act,[284] emphasizing that it is unlikely that Congress intended that permanent withdrawals, such as military or naval reservations, should be subject to metalliferous mining locations.[285]

The current problem is therefore perhaps not so much the proper interpretation of the Pickett Act as the question of determining on what basis a particular withdrawal was made. In a recent departmental case,[286] a 1941 withdrawal order recited: "By virtue of the authority vested in me as President of the United States and by the Act of June 25, 1910, it is ordered that described lands be reserved and set apart . . . as a refuge."[287] The Interior Department observed that over a period of 3 years preceding the order, a number of Executive orders were made invoking both the implied power and the authority delegated by the Withdrawal Act. Mining locations were expressly authorized in some of these. The Department then concluded that a full exercise of Presidential authority is intended unless there is a specific provision that mining activities shall not be prohibited. This construction, of course, nullifies the spirit of the Withdrawal Act.[288]

Relief Legislation. As is often the case in the legislative process, controversies of short-range importance tend to postpone the solution of real problems. This was certainly true during the years from 1910 to 1920 when almost every session of Congress considered what was to be done with the withdrawn petroleum lands. It is not an exaggeration to say that the debates ranged from proposals to hand over all the public oil lands to the states, to plans for sale or leasing, or a combination of the two.

Although the real problem was clear (*i.e.*, leasing as opposed to sale), the "touchy" question in the background always was whether anything should be done for oil companies which were caught, at the time of the 1909 Taft withdrawal, in various stages of prospecting: activities which ranged anywhere from "paper locations" to actual drilling, short of discovery.

---

[282] It is not intended to suggest that there are no other bases for withdrawals. Congressional legislation may authorize a specific withdrawal, or withdrawals may be made to carry out the terms of certain general land-grant statutes.

[283] The most recent statement appears to be in Arizona v. California, 373 U.S. 546 (1963) in which Mr. Justice Black citing the *Midwest* case, stated: "We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive."

[284] I expressed some doubt about this conclusion in 1960. See 1 AMERICAN LAW OF MINING 80 81 (1960). Several writers assume that implied powers exist. See Parriott, *Mining Rights in Public Land*, 34 TEX. L. REV. 892, 894, n.16 (1956); Palmer, *Problems Arising Out of Public Land Withdrawals of the Atomic Energy Commission*, 2 ROCKY MT. MIN. L. INST. 77, 81 (1956); Lowe, *Withdrawals and Similar Matters Affecting Public Lands*, 4 ROCKY MT. MIN. L. INST. 55 (1958); Phipps, *Leasing and Mineral Development of Withdrawn Public Lands*, 10 ROCKY MT. MIN. L. INST. 261, 269 (1965). The Interior Department similarly follows this view. P & G Mining Co., 67 I.D. 217 (1960).

[285] The distinction between the implied power and Pickett Act withdrawals is often said to depend upon whether the withdrawal is for a permanent or temporary purpose.

[286] P & G Mining Co., 67 I.D. 217 (1960).

[287] 6 FED. REG. 1016 (1941).

[288] *Cf.* Noel Teuscher, 62 I.D. 210 (1955). On the effect of withdrawals on mining locations and oil and gas leasing, see 1 AMERICAN LAW OF MINING c. vii, 299 (Martz ed. 1960).

BEST AVAILABLE COPY

Although this is only of historical interest now, it is worth noting in some detail because it was the principal factor in the failure of Congress to adopt a leasing system for 10 years. Petitions for relief for the California operators were constantly the stumbling block to legislation.[289]

Confident that the courts would declare the withdrawal unconstitutional, many oil companies continued prospecting or drilling on withdrawn land on which no discovery had been made before September 1909. The California oil interests convinced the Senate committee considering the Pickett bill to insert a savings clause protecting bona fide operators who were in diligent prosecution of work leading to a discovery at the date of any *prior* or any *future* withdrawal.[290] There was no agreement as to what type of activities were contemplated by this provision. But what is more important, the act expressly refused to make any pronouncement about prospecting activities initiated after the 1909 withdrawal.[291] When President Taft, after the enactment of the statute, reconfirmed his earlier order on July 2, 1910, and withdrew approximately the same land, the legal rights of occupants whose activities began after 1909 were thrown into utter confusion. If they were to be judged as of the date of the second withdrawal order, they would seem to be protected by the Pickett Act. Although this conclusion might conceivably be unfair to companies that had observed the original order, still it cannot be emphasized too much that there was a real, honest division of opinion on the constitutionality of the withdrawal order. As has been observed, even the President had grave reservations.

To complicate the picture somewhat, the Interior Department had announced in 1909 that companies which had purchased claims on which there had been no discovery at the time could not obtain patents even though oil was later found.[292] The oil companies managed, without too much difficulty, to get Congress to reverse this ruling in the Assignments Act of 1911.[293]

Further problems arose when the Interior Department announced that it intended to "recapture" land which had been patented to the Southern Pacific Railroad under its land grant and which later turned out to be valuable for petroleum. Much of this land, located in the withdrawn fields in California, had been purchased by the oil companies. Later, in 1912, the President withdrew the two naval reserves in California previously mentioned. Most of the land in these areas had already been patented to the railroad. Other patents were based on "dummy" locations and were subject to possible cancellation for fraud. In 1913, the government instituted several suits to recover these patented lands and for an accounting for oil produced and sold illegally.[294] The indication was that the Pickett Act was going to be construed strictly as affording no protection to producers commencing prospecting after September 1909, but before the second withdrawal in 1910. As a result, refineries were reluctant to purchase crude oil from these producers because they too might be accountable to the government. If they could not secure relief from the producers, the purchasers would pay for their oil twice. The government

[289] The best account of efforts to obtain relief legislation will be found in White, *supra* note 229, at 439-59. The account in the text is indebted to Mr. White's material. Relief legislation is also discussed in Ise, *supra* note 228, at 309-25 (1926).

[290] Section 2 provides: "That the rights of any person who, at the date of any order of withdrawal, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work . . ."

[291] See note 279, *supra*.

[292] H. H. Yard, 38 I.D. 59 (1909).

[293] 36 STAT. 1015 (1911).

[294] Ise, *supra* note 228, at 320.

opposed any proposed agreement with the purchasers which might afford them some protection if the producers were later denied patents. The Operating Agreements Act of 1914[295] to some extent protected operators who commenced drilling within 3 months after the second withdrawal.

When the *Midwest* decision[296] upheld the 1909 withdrawal, the government stepped up its litigation to nullify earlier patents in California. Relief legislation in the form of the Phelan and other proposals sought to protect drillers who commenced operations prior to the second withdrawal in 1910. Plans to relinquish some land in the naval reserves in return for leases were made by the oil companies and vigorously opposed by the Secretary of the Navy. When agreements could not be reached, the production of crude oil allegedly declined, and, at one time, there were threats of commandeering the California oil fields to avert a possible shortage of oil for the Navy.

Eventually, with the adoption of the Mineral Leasing Act of 1920,[297] some relief provisions were adopted, although they were not, of course, as liberal as the oil people hoped for. Throughout the 10-year period the pressure put directly on two Presidents, the Secretaries of the Interior and the Navy, and the Attorney General, as well as the congressional committees, by the oil interests was fantastic. Pinchot and other conservationists aligned themselves with the Secretary of the Navy who opposed all such legislation. Secretary of the Interior Lane, who was admittedly to some extent sympathetic to the California oilmen, was bitterly criticized by Pinchot and the eastern newspapers. Professor Ise, usually objective, is quite critical of the Secretary. He attributes the latter's equivocal position to the fact that he was a lawyer and "the training of a lawyer often leads to an exaggeration of individual rights and an inability to see social rights . . ."[298] On the other side of the coin,[299] his statement is rather typical of the Roosevelt conservationists who were fanatically inclined to condemn anyone whose views differed, even slightly, from their own. They saw a monopolistic conspiracy behind every derrick. This attitude left its mark on both the Taft and Wilson administrations which, because of the congressional backlash, had great difficulty obtaining conservation legislation of any type.

The Period of Reservation: 1910-1920. It will be remembered that a series of acts between 1909 and 1912 permitted nonmineral entries on public land valuable for coal and provided for the issuance of limited patents.[300] Similar legislation was enacted in 1912, which allowed surface entries on oil, gas, and phosphate land located in Utah only.[301] When Representative Stephens of Texas questioned the wisdom of confining the act to Utah, he was informed by Representative Mann of Illinois that Representatives of the other western states did not favor such legislation and, therefore, these "gentlemen decided to try it first on the dog."[302] The experiment apparently proved to be harmless, for on July 17, 1914, an act was passed authorizing all forms of nonmineral entry on withdrawn land containing these minerals.

During the Woodrow Wilson administration there was constant pressure to open

[295] 38 STAT. 708 (1914).

[296] See note 271, *supra*.

[297] 30 U.S.C. § 181 (1964 ed.)

[298] Ise, *supra* note 228, at 337.

[299] White, *supra* note 229, is more sympathetic to the oil operators.

[300] 35 STAT. 844 (1909); 36 STAT. 583 (1910); 37 STAT. 105 (1912).

[301] 37 STAT. 496 (1912). The original Senate bill was not so restricted. See 48 CONG. REC. 1728, 1756, 3478-79 (1912). A similar statute permitted selections by the State of Idaho of phosphate and oil lands. 37 STAT. 687 (1913).

[302] 48 CONG. REC. 11339 (1912). 38 STAT. 509 (1914) provided for agricultural entry on lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals.

BEST AVAILABLE COPY

up the oil lands. The failure of Congress to take any position on leasing for an entire decade has frequently been criticized by historians. John Ise's thorough study convinced him, however, that this appraisal is not in accord with the facts. His basic position, often overlooked, is found in the following brief passage:

> During this time there was always overproduction of oil from privately owned lands, and there was never any need or justification for opening any public oil lands . . .[303]

Two timid steps toward leasing were taken in 1914 when the Alaska coal lands, after considerable debate, were put on a leasing basis,[304] and in 1917, because of the importance of potash in the manufacture of explosives, the Potash Leasing Act was adopted.[305] As far as the oil lands were concerned, every session of Congress during the decade after 1910 saw bills proposing either outright transfer to the states of these public lands or providing for leasing under various types of controls. There would be no profit in tracing all of these proposals. Most were short-lived after being referred to the Public Land Committees. Two of the most important, however, should be noted. The first was introduced by Representative Scott Ferris of Oklahoma, Chairman of the House Committee on Public Lands, in April 1913. Mr. Ferris' proposal was an administration measure providing for complete revision of the laws applicable to coal, oil, gas, phosphate, potassium, and sodium. It is important because it advocated a mixture of sale and leasing. It provided for prospecting permits on tracts which might vary in size, depending upon how closely they were located to producing wells. If oil was discovered, the licensee could obtain a patent to one-fourth of the land. It was debated at length,[306] and there was considerable dispute as to the Federal-State sharing of royalties. A compromise bill introduced by Senator Walsh of Montana in the first session of the 65th Congress was defeated largely because of Pinchot's objection to the relief provisions.[307]

The Mineral Leasing Act of 1920. The first session of the 66th Congress saw a new bill on the oil lands reported from the Committee on Public Lands by its Chairman, Senator Reed Smoot of Utah.[308] Although he had been opposed to leasing in the past, Senator Smoot now conceded that it was clear that Congress would consider opening up the withdrawn oil lands only if the committee reported a bill providing exclusively for leasing. He lamented the fact that 6.5 million acres of oil lands and 2.7 million acres of phosphate land had been withdrawn from all development. He noted also that 3.5 million acres of oil-shale land had been classified and that 43.7 million acres of coal land had been withdrawn, only 27.3 million acres of which had in fact been classified.[309] Confronted with this situation, most (but not all) western Senators reluctantly agreed that leasing was the only solution. Typical of their attitude was the statement by Arizona Senator Ashurst who said he would "hold his nose and vote for the bill."[310]

The Smoot bill, on the whole, was favorable to the western interests.[311] The 36 sections of the bill cannot be discussed here in detail. The basic scheme was to provide different rules for leasing proved and unproved oil fields. In the case of the former, leases could be issued on competitive bidding in tracts of not more than 640 acres and for a period of 20 years at a 12½ per-

[303] Ise, *supra* note 228, at 327.

[304] 38 STAT. 741 (1914). See Alaska Coal-Leasing Bill, Hearing before the Committee on Public Lands, House of Representatives, 63d Congress, 2d Sess., on H. R. 13137 (1914).

[305] 40 STAT. 297 (1917).

[306] 51 CONG. REC. 14945-50, 14953, 14964 (1914).

[307] 58 CONG. REC. 4112, 3705, 10382 (1919).

[308] 58 CONG. REC. 3886 (1919).

[309] 58 CONG. REC. 4112 (1919).

[310] 58 CONG. REC. 4250 (1919).

[311] The bill appears in 58 CONG. REC. 4054-57 (1919).

cent royalty. There was a privilege of renewal on terms to be prescribed by the Secretary of the Interior. Where the land was "wildcat" or unproved land, the Secretary was authorized to issue prospecting permits for 2 years, covering not more than 2,560 acres. On discovery, the permittee could obtain a lease to one-fourth of the land for 20 years at a royalty of 5 percent, with a nominal rental and a right of renewal. The permittee also had a preference right to a lease of the remainder of his 2,560-acre tract at a royalty of 12½ to 25 percent.

The royalties from all leases (except in Alaska) were to be divided as follows: 45 percent to the Reclamation Fund; 45 percent to the state for schools; 10 percent to the Federal Treasury. There were numerous provisions relating to monopoly control, alien ownership, waste of oil and gas, flooding of the oil sands, drilling of offset wells, and relief to operators on withdrawn land.

The Senate debated the bill over a period of 14 days. In an atmosphere of tired resignation, the attendance often consisted of no more than 12 or 14 Senators. It is true that occasionally one would hear extravagant statements from Senator King of Utah (". . . I am absolutely opposed to the leasing system, the paternalism, the bureaucracy, the autocracy, the un-American system that the leasing system entails . . .")[312] or from Senator Fall of New Mexico (". . . collectively as a government in business matters we are and always have been and always will be a failure."[313] There has "never been a mine opened in the United States by any geological or other experts."[314]). But, on the whole, the debate in both the Senate and the House concentrated more rationally on the specific aspects of the proposed legislation. The main issues discussed at length were: (1) whether government development and operation of the oil lands would be a feasible alternative; (2) the generosity of the relief sections; (3) restrictions in the Smoot bill on alien ownership of leases, either directly or indirectly through stock ownership; (4) the division between the states and the Federal government of royalties; and (5) the loss of taxes which the states would suffer under a system in which title to the oil lands was reserved in the Federal government. A few observations on these various points from both the Senate and the House are given below. The House eventually amended the Senate bill rather drastically,[315] and its recommendations were finally adopted by the conference committee.[316]

The threat that the government might take over and operate the oil lands was not voiced for the first time in the 1919 debates.[317] Senator Walsh of Montana felt that this was one good reason for adopting a leasing system immediately.[318] On the other hand, a newcomer from Massachusetts by the same name advocated government operation because of the "failure of private enterprise."[319] An unusual amendment, offered by Senator Kirby of Arkansas, would substitute for the bill under consideration a brief statement authorizing the President at his discretion to mine coal, oil, and gas on the public domain under the direction of the Secretary of the Interior when the "public exigency" may require.[320] Obviously made to needle the western in-

[312] 58 CONG. REC. 4111 (1919).

[313] 58 CONG. REC. 4290 (1919). Albert B. Fall later became Secretary of the Interior in the Harding administration. His conviction for accepting a bribe in connection with the Teapot Dome scandal might be taken as an indication that he was not so astute in business matters himself. Teapot, Fall *et al.* will be considered in Part 3 of this chapter.

[314] 58 CONG. REC. 4284 (1919).

[315] 58 CONG. REC. 7299 (1919).

[316] 58 CONG. REC. 7796 (1919).

[317] See note 296 and text which follows.

[318] 58 CONG. REC. 4112 (1919).

[319] 58 CONG. REC. 4171 (1919).

[320] 58 CONG. REC. 4283 (1919).

erests and with no hope of success, the mendment elicited painful astonishment rom Senators Fall of New Mexico, King of Utah, and Walsh of Montana, whose re-ctions were thoroughly enjoyed by the enator from Arkansas. Kirby's thesis was hat if the supply of oil was as vital to the uture of the Navy as everyone had sug-ested, and if the time had actually come o unlock the public domain reserves, why ot authorize the government to keep for he public what belonged to it as a matter f right? He felt confident that the govern-ment could mine as economically as private enterprise and even conceded that the gov-ernment might pay taxes to the states on the oil lands. The western Senators could only rejoin that private enterprise alone was capable of financing such an undertak-ing. The Kirby amendment was rejected after only a few hours of debate.[321] Senator La Follette of Wisconsin later offered an amendment which would permit the gov-ernment to set a fair price on all products (whether in crude or refined form) derived from the leased lands.[322] He felt that the Standard Oil Company which, he alleged, indirectly controlled large operations in California and particularly in the Salt Creek Field in Wyoming would, despite the use originally of dummy entrymen, eventually obtain leases under the bill. Price-fixing would eliminate manipulation by the company of its prices for crude and refined oil. Only Senator Lenroot of Wis-consin felt constrained to reply. He argued that it would be impracticable to fix prices for refined products because of the diffi-culty of tracing the oil produced under the public domain leases into the com-pany's many refineries. Falling upon "in-different ears," the amendment was de-feated, although, surprisingly enough, it did receive 10 votes.[323]

[321] 58 Cong. Rec. 4416 (1919).
[322] 58 Cong. Rec. 4755 (1919).
[323] 58 Cong. Rec. 4756 (1919).

Senator La Follette became very inter-ested in the bill, attacking primarily the re-latively liberal relief provisions proposed in the Senate bill. For one thing, he felt that the measure would destroy the naval re-serves. His amendment to exclude the re-serves from the Senate bill was defeated.[324] It was inevitable that the old controversy be-tween Secretary of the Interior Lane and Secretary of the Navy Daniels over the re-serves would be rehashed, and La Follette made a dramatic appeal by introducing let-ters from Daniels and Assistant Secretary of the Navy Franklin Roosevelt.[325] The argu-ments over the relief provisions centered mainly around the question whether pros-pectors who entered after the September 1909 withdrawal should receive any consid-eration at all in view of the fact that they were technically trespassers, despite the fact that they sometimes relied in good faith on the belief that the withdrawal order was unconstitutional. La Follette introduced a list of the oil companies which would profit handsomely from the provision.[326] Among them, of course, was the perennial target of the Progressives, the Standard Oil Company.

The bill as finally passed by Congress in 1920 contained relief provisions inserted by the House which were less favorable to the oil companies.[327] It protected those who had entered prior to the Taft withdrawal of July 2, 1910 (confirming the earlier with-drawal) provided they had continued oper-ating in good faith after discovery. They were permitted to relinquish their claims in return for 20-year leases at a minimum royalty of 12½ percent, with payments to be made, of course, on past production. Not more than one half of the area in the geologic structure (in any event, not to ex-ceed 3,200 acres) could be leased to any

[324] 58 Cong. Rec. 4745, 4767, 4775 (1919).
[325] 58 Cong. Rec. 4759 (1919).
[326] 58 Cong. Rec. 4766 (1919).
[327] 30 U.S.C. § 227 (1964 ed.).

one claimant. In the naval reserves, leases were given only on producing wells, unless the President in his discretion chose to lease the remainder. It is not known how many leases were eventually granted by the government under the relief provisions. It is doubtful that there were as many as the 10-year controversy would seem to have warranted. It is said that Standard Oil of California, at least, was eligible for leases on 1,400 acres outside the naval reserves and to wells on 960 acres inside Reserve No. 2. The company's claims were sold very shortly after the enactment of the new statute.[328]

The problem of alien ownership—described by Professor Ise as a "delicate and baffling question"[329]—was discussed at length in both Houses of Congress. Great Britain's international oil policy at this time was quite openly criticized,[330] and many legislators feared that retaliatory action would be taken by Mexico.[331] "Open door" abroad and "closed door" at home, Ise points out, created what was obviously an impossible dilemma for most Congressmen. Eventually, a compromise based on the notion of reciprocity was reached in the 1920 Act: aliens were prohibited from owning interests in leases either directly, or indirectly through stock, only if they were nationals of countries which prohibit similar ownership by Americans.[332]

The allocation of a portion of the royalties to the states in which the public lands are located has always been a controversial issue. The Smoot bill in the Senate had been generous to the states. (The distribution, it will be remembered, was 45 percent to the states, 45 percent to the Reclamation Fund, and 10 percent to the Federal government.) This was not surprising since the Public Lands Committee consisted largely of westerners. The matter of apportionment was debated more extensively in the House than in the Senate. At the outset, it appeared that there were royalties due on something like $20 million of oil produced in the past on land which was within the relief provisions of the new act. Representative Sinnot of Oregon suggested that this fund be distributed: 10 percent to the Federal government, 70 percent to the Reclamation Fund, 20 percent to the states in which the lands were located.[333] After the chairman's ruling that Sinnot's motion was not germane because the bill contemplated only the distribution of future royalties, Representative Ferris of Oklahoma moved a substitute amendment which would authorize all royalties to be paid into the Reclamation Fund.[334] This apparently had been the recommendation of the administration. The Ferris amendment was eventually withdrawn for lack of support. The conference committee of the two Houses finally worked out a compromise which became part of the new law: 52½ percent to the Reclamation Fund; 37½ percent to the states in which the lands are located for education and roads; 10 percent to the Federal Treasury.[335]

It would be inappropriate here to outline the detailed provisions relating to oil and gas in the Leasing Act as it was finally adopted on February 25, 1920. The basic format was essentially the same as the Smoot bill. The House eliminated the provision for maximum royalties on leases, cut down the relief provisions, permitted more extensive ownership by aliens, and modified the apportionment of royalties be-

[328] See White, *supra* note 229, at 459.

[329] See Ise, *supra* note 228, at 347.

[330] 58 Cong. Rec. 7513-15, 7529 (1919).

[331] In 1921, it is estimated that British and American oil investments in Mexico amounted to at least $300 million. Engler, The Politics of Oil: Private Power & Democratic Directions 193 (1961) (Phoenix ed. 1967).

[332] 30 U.S.C. § 181 (1964 ed.).

[333] 58 Cong. Rec. 7649, 7771 (1919).

[334] 58 Cong. Rec. 7651, 7652 (1919).

[335] 30 U.S.C. § 191 (1964 ed.).

BEST AVAILABLE COPY

tween the states and the Federal government. The act has, of course, been supplemented several times since 1920 and changed in several material respects.

Since substantial space in this chapter has been devoted to the history of coal resources in the public domain, brief attention should be given to the provisions of the new law relating to coal leases. The act gives the Secretary of the Interior authority to issue prospecting permits, limited licenses, and leases.[336] The limited license is used primarily to permit municipalities in times of emergency to mine coal in small areas for the benefit of impoverished families. Two-year permits to prospect for coal in unproved land may be issued in the discretion of the Secretary. There are acreage limitations and the Secretary requires a clear showing that market conditions justify the permit. The prospecting permit is a prerequisite for the issuance of a preference lease (which presupposes that coal in commercial quantities exists in the area). When conditions warrant, leases, not to exceed 2,560 acres, may also be offered by the Department on the basis of competitive bidding. There are provisions for minimum rentals and royalties.

The Leasing Act was the first major change in the public mining laws in more than 50 years. It was the second major change in 120 years. That the mining laws were outmoded, at least as to oil and gas, long before 1920 was a truism seemingly known to everyone except Congress. Now and then a cry in the wilderness came from Interior or the Office of the President, and sometimes it could be heard in the House of Representatives. The Senate more often than not seemed to be too influenced by what is tritely referred to as "special interests." It is no wonder that a contemporary writer has cynically described the Leasing Act as[337]

> ... a belated effort to safeguard the remnants of the nation's lands west of the Alleghenys after a century and a half of speculation and exploitation masked by exalted references to manifest destiny and internal improvements and tempered by safety-valve theories for hard-pressed Eastern workers and homestead settlements for sturdy family farmers.

[336] 30 U.S.C. § § 202-208 (1964 ed.). Departmental regulations will be found in 43 C.F.R., Part 3130 (1967). Coal leasing is discussed generally in 2 AMERICAN LAW OF MINING § § 10.43-10.46 (Martz ed. 1960).

[337] Engler, *supra* note 331, at 81.

Part 3
Contemporary American Mining Law

The history of public mining law in this country has yet to record a plateau of comparative quietude. The events which have transpired since the enactment of the Mineral Leasing Act of 1920 are, in their own setting, as unusual as the dramatic episodes of the past. The major problems arising during this later period will be covered in other special reports which are being prepared for the Public Land Law Review Commission. To attempt to evaluate what has been done to provide solutions for these problems would be to infringe upon their domain. It would be naïve to attempt to judge the operation of contemporary mining law without the necessary data to support the conclusions. Accordingly, Part 3 of this chapter will simply recount the major "crises" during this period, with a somewhat closer look at those periods which are now "ancient history" in mining law.

BEST AVAILABLE COPY

The Twenties: On the Mixing of Oil and Politics

John Ise has briefly recorded the chaotic frenzy which generally prevailed in the oil reserves after the passage of the Mineral Leasing Act in 1920. Advance men—scouts—had already prospected the most likely areas, and claimants by the droves were ready to file applications once the bill was signed by the President. Applications began to pour in by telegraph and, within a year, 5,000 applications for permits had been filed with the Land Office. In some areas there were miraculous "discoveries" which coincided with the passage of the act. By the end of June 1924, over 32,000 applications were received, but out of all this activity, only about 45 leases were actually issued.[338]

Teapot Dome. All this was eclipsed by the bizarre politics of the period. We have previously discussed the four Naval Petroleum Reserves in California, Wyoming, and Alaska, which were established in 1912, 1915, and 1923 to insure an adequate supply of oil for the future needs of a navy which was beginning to convert its battleships from coal to oil.[339] Naval oil shale reserves were also established in Utah and Colorado in 1916. We have noted the role which the naval reserves played in the failure to obtain congressional legislation on oil and gas leasing on the public domain until 1920.[340] The reserves were destined also to highlight the brief administration of President Harding in the Teapot Dome scandal, which involved Reserves No. 1 and 2 in California and No. 3 (Teapot) in Wyoming. "Teapot" is from an unusual rock formation which dominated the reserve near Casper, Wyoming.

Within 6 months after the passage of the Mineral Leasing Act Congress gave the Secretary of the Navy extensive jurisdicition over the reserves.[341] He was authorized to take possession and to develop the reserves at his discretion. This included authority to execute contracts or leases and to "use, store, exchange or sell" the oil and gas royalties therefrom. In 1921, Albert B. Fall, a former Senator from New Mexico, was appointed Secretary of the Interior by President Harding. His position on the Leasing Act has already been observed in his statement deploring the role of government in business.[342] His later involvement in the reserves clearly substantiated the early suspicion of conservationists like Gifford Pinchot that Fall was basically opposed to their program. Shortly after his appointment, Mr. Fall persuaded the Secretary of the Navy, Edwin Denby, to relinquish control of the administration of the reserves to the Interior Department. This was effected by a secret and unpublished Presidential order making the transfer.[343] The conservationists had already been outraged by Fall's early proposal to transfer Pinchot's beloved Forest Service of the Department of Agriculture to the Interior Department. And, when rumors began to leak out that Teapot was being leased to Fall's friends, a frontal attack on Fall's administration of the Department was launched. Prodded by Senator LaFollette, Congress authorized an investigation[344] which revealed a strong possibility that Fall, who had since resigned, had accepted bribes to execute petroleum leases on the reserves. After a period of embarrassing but characteristic silence, President Coolidge finally bypassed his own Justice Department and appointed Owen J. Roberts (later Associate Justice of the Supreme Court for 15 years) and Atlee Pomeroy, both of whom were in no way associated

[338] Ise, The United States Oil Policy 352-54 (1926).

[339] See Part 2, "Pickett Act."

[340] See Part 2, "Relief Legislation."

[341] 41 Stat. 812, 813 (1920).

[342] See Part 2, n. 314.

[343] The order was probably invalid. See United States v. Pan-American Petroleum Co., 55 F.2d 753, 769 (9th Cir. 1932) *cert. den.* 287 U.S. 612 (1932).

[344] Joint Resolution, 43 Stat. 5 (1924).

BEST AVAILABLE COPY

with the government, to act as a team to bring suit to cancel the leases and to prosecute those responsible for the fraud.

When Fall's activities were uncovered it was found that he had secretly and without competitive bidding leased all of Teapot Dome to Harry Sinclair, and large portions of the California reserves to E. L. Doheny.[345] The legal authority to execute the leases was, of course, questionable in view of the statute referred to above giving the Secretary of the Navy jurisdiction over the reserves. But it was the details of the bribery which triggered off the biggest political scandal of the century. It touched leading figures in both political parties, ruined the careers of several who were accidentally involved with the major participants, and disenchanted a generation of Americans about the business of government as well as the oil industry. Although space does not permit a discussion of the details of the episode,[346] it does not seem inappropriate to spell out briefly the general terms of the contracts and leases with Sinclair and Doheny.

In Doheny's contracts relating to Reserve No. 1, the government agreed to exchange its royalties in crude oil from leases on the reserve for a promise to construct storage tanks in Pearl Harbor, Hawaii. The contracts were actually with Pan American Petroleum and Transport Company, a corporation controlled by Doheny. The company also agreed to deliver oil for use by the Navy at Pearl Harbor and certain eastern ports. Leases subsequently executed on the reserve were assigned to an affiliate, Pan American Petroleum Company. Doheny was also involved in Reserve No. 2 in which drainage had in the past been regarded as a serious matter because of the numerous private holdings within the area.[347] Earlier leases with other persons had been executed for drilling off-set wells and no impropriety had ever been suggested. In *Pan-American Petroleum & Transport Co. v. United States*,[348] the Supreme Court cancelled two contracts with Transport and two leases in Reserve No. 1 with Pan American. Both corporations were controlled by Doheny, who had given Secretary Fall $100,000 in connection with the leases. The court found that there existed a corrupt conspiracy between Fall and Doheny to secure for the company leases of all unleased land in the reserve; that the leases were not authorized by the Naval Reserve Act since there was no evidence of possibility of loss of oil through drainage; and that the contracts to exchange oil royalty for facilities were beyond the powers of the Secretary under the act. The company was required to account for all oil illegally produced and was not credited with the cost of construction work performed, wells drilled, or fuel oil furnished at Pearl Harbor.

The Sinclair leases in Teapot Dome were executed in much the same atmosphere. The 1920 statute giving the Secretary responsibility for the reserves did not authorize leasing where there were outstanding claims or applications for leases. It is said that a million dollars were spent by Sinclair to buy up claims which were virtually worthless. Secretary Fall even went so far as to call out the Marines to evict rival claimants for Sinclair's benefit.

In the lease executed with Sinclair's Mammoth Oil Company, the government royalty, instead of being payable in cash,

[345] For a reference to better days for Mr. Doheny, see Part 2, "The Petroleum Lands."

[346] For a definitive treatment of the scandal, see NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920's (1963). WERNER AND STARR, TEAPOT DOME (1959) is interesting and readable. For contemporary accounts, see RAVAGE, THE STORY OF TEAPOT DOME (1924); ISE, THE UNITED STATES OIL POLICY 356-88 (1926). An interesting appraisal of the actual trials, sufficiency of evidence, etc., is Haglund, *The Naval Reserves*, 20 GEO. L. J. 293 (1932).

[347] See United States v. Belridge Oil Co., 13 F.2d 562 (9th Cir. 1926) *cert. den.* 273 U.S. 733 (1926) sustaining a drainage lease in Reserve No. 1.

[348] 273 U.S. 456 (1927).

could be paid in oil certificates which could be exchanged for oil, storage facilities, or cash. The strange storage-facilities agreement contemplated that the government would relinquish two-thirds of its oil royalty in order that the lessee might build tanks to store the other one-third of the government royalty. In Teapot, there was no evidence of the danger of drainage from private adjoining landowners. The reserve actually contained much less oil than had been anticipated, thwarting what was said to have been Sinclair's boast that he would make over $100 million on the deal. Sinclair was alleged to have paid Fall well over $300,000 for the leases.

The Teapot Dome lease was cancelled on the ground of a fraudulent conspiracy between Fall and Sinclair in *Mammoth Oil Co. v. United States*,[349] which effectively documents the case against Secretary Fall. Fall was later convicted of accepting a bribe from Doheny[350] although Doheny himself was acquitted of giving the bribe on much the same evidence. Sinclair was convicted only of contempt of the Senate for refusal to answer, among others, questions relating to the purchase of outstanding claims in the Teapot Dome Reserve.[351] Recent historians have been reluctant to consign Fall to the villainous role generally painted during the twenties. In a light most favorable to him, it must still be said that it is unlikely that his sudden wealth was from money loaned to him, as he so earnestly contended. He also displayed poor judgment in lying initially about the source of the loan. Whether he actually believed that the reserves were in danger of drainage and that the international situation necessitated immediate development are matters which perhaps can never be determined with any degree of accuracy.

The exclusive jurisdicition of the Secretary of the Navy over outstanding uncancelled leases was confirmed by congressional action in 1928.[352] Teapot was sealed in 1927 and since then has returned to the government only nominal grazing fees.[353] In 1956[354] there was a general revision of the statutes relating to the reserves. The Secretary of the Navy is given discretionary power to "explore, prospect, conserve, develop, use and operate" the reserves. In 1962 portions of the naval oil shale reserve in Rifle, Colorado, were authorized to be leased for research under the supervision of the Interior Department.[355] The Secretary's powers may be performed directly or through leases or contracts. In Reserve No. 1, the Secretary is authorized to enter into cooperative or unit plans involving land owned by the government and privately owned land which is within the reserve or within the same geologic structure. Reserve No. 2 has been leased for years because of drainage problems, the leases being administered by the Secretary of the Navy under rules and regulations promulgated by the Secretary of the Interior.[356]

Whether the reserves should be turned over to commercial exploitation by private oil companies has been considered often

[349] 275 U.S. 13 (1927).

[350] United States v. Fall, 49 F.2d 506 (D.C. App. 1931) *cert. den.* 283 U.S. 867 (1931).

[351] Sinclair v. United States, 279 U.S. 263 (1929). Other litigation involved Attorney General Harry M. Daugherty (McGrain v. Daugherty, 273 U.S. 135 [1927]), and H. M. Blackmer who will go down in history as contributing an interesting point of Conflict of Laws in Blackmer v. United States, 284 U.S. 421 (1932). There was also litigation with Standard Oil in connection with school lands in a portion of Reserve No. 1. West v. Standard Oil Co., 278 U.S. 200 (1929); Standard Oil Co. v. United States, 107 F.2d 402 (9th Cir. 1940) *cert. den.* 309 U.S. 673 (1940).

[352] 45 STAT. 148 (1928).

[353] "Oil: Footnote to a Scandal," 53 NEWSWEEK 62 (Feb. 2, 1959) points out that in 1958 the revenue from grazing leases was $758.

[354] The present statutes are found in 10 U.S.C. § 7421 (b) et seq. (1964).

[355] 10 U.S.C. § 7438 (1964).

[356] 43 C.F.R. § § 3120.2-3120.3-2 (1967).

BEST AVAILABLE COPY

since 1945. After spending $52 million exploring and developing Reserve No. 4 in Alaska, the Secretary of the Navy was asked in 1954 whether the time had come to turn the reserves over to private companies. His reply: "The policy is the same . . . the best reservoir for oil is in the ground."[357] Although the four reserves are popularly said to hold nearly a billion barrels of oil worth nearly $2½ billion, current income to the Federal government a few years ago did not exceed $15 million annually.[358] The very mention of Teapot Dome has made politicians wince for the last 35 years. In 1959, President Eisenhower courageously suggested that the reserves were an anachronism and recommended continuing study of the advisability of their disposal.[359] He felt that they were no longer a significant defense measure since a worldwide petroleum industry must be relied upon in both peace and war to provide our requirements. One might add, they may be even less important in a nuclear age.[360]

The Closing and Reopening of the Public Domain to Oil and Gas Leasing. The 1920 Leasing Act was generally regarded as compromise legislation as far as the opposing forces of conservation and exploitation were concerned. At the time, some may have believed that the production of oil might diminish in the future, although the over-production in the first 20 years of the century furnished no support for this position.[361] As might have been predicted, over-production, depletion, and wasteful mining practices in the 1920's caused serious problems.[362] The ominous possibility of an oil shortage eventually occurring led President Hoover to inaugurate a new and drastic policy on oil conservation. An understandable desire to disassociate his party from Teapot was undoubtedly a secondary consideration. Eight days after he took office, the President announced that there would be "no leases or disposal of government oil lands, no matter what category they may be in; . . . except those which may be made mandatory by Congress. . . . In other words there will be complete conservation of government oil in this administration."[363] The next day Secretary of the Interior Wilbur requested the Commissioner of the Land Office to instruct all local offices to receive no further applications and to reject all those which were pending. It is estimated that 20,000 were pending on March 12, 1929. Moreover, the government inaugurated a concerted effort to cancel outstanding inactive permits. Between 1929 and 1932 approximately 16,600 outstanding prospecting permits were cancelled for failure to comply with the provisions of the Leasing Act relating to the commencement of drilling.[364]

The issues were clearly joined: Did the Secretary of the Interior or the President have discretion under the Leasing Act to refuse to issue permits on a wholesale basis because of the over-production of oil? To what extent, if at all, did the Mineral Leasing Act affect the President's withdrawal powers under the Pickett Act of 1910? Did the order of the Secretary actually constitute a withdrawal of the oil and gas reserves?

A mandamus case was soon instituted to determine the validity of a refusal to grant a permit to an otherwise qualified applicant whose application had been filed after the deadline. The questions raised above

[357] "Oil—Round 2," 130 NEW REPUBLIC 4 (April 5, 1954).

[358] See note 353, *supra*.

[359] 105 CONG. REC. 751, 759 (1959).

[360] See ENGLER, THE POLITICS OF OIL: A STUDY OF PRIVATE POWER AND DEMOCRATIC DIRECTIONS 83-86 (1961).

[361] See Part 2, n. 230 and text, n. 303 and text.

[362] See CONSERVATION OF OIL AND GAS: A LEGAL HISTORY 1948 (Murphy ed. 1949).

[363] Quoted in NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920's 209 (1963).

[364] See note 362, *supra*, at 605.

were not answered in a very satisfactory way. The District of Columbia Court of Appeals reversed the lower court which granted the relief sought. The majority opinion seemed to feel that the Secretary's order did in fact constitute a withdrawal and that the Leasing Act in no way limited the discretion which the Secretary had under the Pickett Act. The court argued that the Leasing Act was no more mandatory than the 1872 Mining Law in this respect and that withdrawals under the latter statute had, of course, been susained.[365] On certiorari to the Supreme Court,[366] Mr Justice McReynolds, affirming the decision, placed the case more on the ground that Section 13 of the Leasing Act could reasonably be interpreted to give the Secretary discretion in issuing permits. The court did, however, feel constrained to add that this interpretation was entirely consistent with the Secretary's "general powers over the public lands as guardian of the people" and also the fact that he did have the right to withdraw public lands from private appropriation under the *Midwest* decision.[367]

The public domain was reopened again to oil leases on April 4, 1932, but prospecting permits were issued subject to certain conservation restrictions relating to unitization and prorationing. Although the system of prospecting permits was abolished in 1935, it has been held that the Secretary has similar discretion in issuing leases.[368]

The Conflict Between Two Regimes: Location and Leasing

It was inevitable that the two systems—location and leasing—would eventually conflict. That the collision was postponed until the early 1950's is in itself remarkable. The story behind this is at once romantic and highly legalistic. The first adjective is used to describe the uranium boom. The last is meant to convey a kaleidoscopic picture of legislation which is so boring that even lawyers shudder when perchance they encounter almost any volume of the proceedings of the Rocky Mountain Mineral Law Institute. No attempt will be made here to wallow in the implications of either term. But, like it or not, "multiple surface use" and "multiple mineral development" are as much a part of the modern law of mining as were "extralateral" and "interlimital" in a better day.

A dubious legacy of World War II was the atomic bomb, which, apart from what one may think about the morality of its use, was something of a windfall for the public miner. As we have intimated, there were certain secondary benefits to the legal profession. The demand for fissionable source materials after the war and the urgency of a government monopoly in them prompted the enactment of the Atomic Energy Act of 1946 which, in sweeping terms, reserved all such ores in public domain land to the United States and required that they also be reserved in any mineral patent.[369] How then could an honest miner make a location based upon the discovery of uranium ore—much less obtain a patent which would be of any value? The question was never answered although one writer reports an unpublished departmental decision holding that the reservation invalidated any mining location based solely upon a discovery of uranium.[370] There was also some indication that a patentee whose location was based on nonfissionable materials could remove the fissionable materials de-

[365] Wilbur v. United States *ex rel.* Barton, 46 F.2d 217 (D.C. App. 1930).

[366] United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414 (1931).

[367] United States v. Midwest Oil Co., 236 U.S. 459 (1915) discussed in Part 2, n. 271 and text.

[368] United States *ex rel.* Jordan v. Ickes, 142 F.2d 152 (D.C. App. 1944).

[369] 60 STAT. 755, 760 (1946).

[370] Note, 4 UTAH L. REV. 239, 251, n. 122 (1954).

BEST AVAILABLE COPY

ite the reservation in the Atomic Energy ct.[371] This prompted claim jumpers, who sed their locations on other materials, locate on top of uranium claims. The tomic Energy Act of 1954 eliminated the oublesome reservation and retroactively lidated all prior locations.[372]

Uranium ores discovered in the Colo- do Plateau area were generally found a type of sedimentary deposit which as also potentially valuable for oil and is. And, one estimate was that as much 75 percent of the available uranium nds were already under Federal oil and is leases.[373]

The conflict between location and leas- ig came about because the Mineral Leas- ng Act, which made certain nonmetalli- erous minerals exclusively leasable, made o provision for disposing of other min- rals which might be discovered in leased nd. On the other side of the coin, there as no attempt to amend the mining aws so as to provide that mining patents nust contain reservations of the various easing Act minerals. A departmental ecision in 1924 ruled that the issuance f a prospecting permit precluded, during he life of the permit, any entry under he general mining laws.[374] Although the decision may seem doubtful in retrospect, it was soon expanded in other departmental decisions to bar entries on any land classified as valuable for Leasing Act minerals or on any land subject to a lease or an allowable application for a noncompetitive oil and gas lease.[375] On the other hand, a locator who had made his discovery prior to the issuance of an oil and gas permit or lease would, of course, have priority.[376] Actually, the lease applicant had more difficulty discovering prior conflicting claims than did the locator.[377]

The uranium boom, which reached its height in 1954, was not unlike the California gold rush except that the average prospector was generally not quite as undernourished. One exception, however, was Charles A. Steen, a penniless geologist, who after unbelievable disillusionment, staked out a claim on a high sandstone ridge southeast of Moab, Utah, which the Atomic Energy Commission had declared to be barren of possibilities. Cer-

[371] See Bloomenthal, *Multiple Mineral Development on the Public Domain*, 9 Wyo. L. J. 139, 142 (1954).

[372] 42 U.S.C. § 2098(c) (1964). It is not to be assumed that there was general agreement on the advisability of repealing the reservation. See 130 New Republic 16 (May 17, 1954) ("... why in heaven's name should we give away and then buy back what is already ours?").

[373] Waldeck, *Uranium Mining Claims Staked on Prior Federal Oil and Gas Leaseholds*, 30 Dicta 56, n. 12 (1953).

[374] Joseph E. McClory, 50 I.D. 623 (1924). McClory claimed to have discovered a placer gold deposit in 1921 while drilling (presumably with no authority) a test well for oil and gas. It was discovered that 11 months before one Sackett had obtained an oil and gas prospecting permit under the Leasing Act, which was in force at the time McClory's location was made. McClory applied for a placer patent, stating that he would agree to a reservation in the patent of all Leasing Act minerals. The Assistant Secretary of the Interior felt that the Leasing Act had the effect of "segregating" such lands and thus withdrawing them from location. This was based on a construction of the Leasing Act that the permit creates an inchoate right which, upon discovery of oil and gas, would absolutely entitle the permittee to a lease. "Hence, it is necessary to treat the land embraced in a prospecting permit as if embraced in an oil and gas lease . . ." The Department acknowledged that the permittee did not have the exclusive right to the use of the surface, however, since under the Leasing Act his rights were expressly subject to the provisions of the stock-raising homestead law. Moreover, it was felt that there could be no reservation of the Leasing Act minerals because the mining law authorized no reservations of this type.

[375] Applicability of the Mining Laws to Lands Known to Contain Any of the Minerals Named in the Leasing Acts of Oct. 2, 1917, and Feb. 25, 1920, 50 I.D. 650 (1924). See also Clear Gravel Enterprises, Inc., 64 I.D. 210 (1957); Jebson v. Spencer, 61 I.D. 161, 164 (1953); Monolith Portland Cement Co., 61 I.D. 42 (1952); United States v. United States Borax Co., 58 I.D. 426 (1943); Dredge Corporation, 64 I.D. 368 (1957).

tainly his discovery was one of the major uranium strikes in the United States and worth, according to contemporary reports, around $60 million.[378] Another, Fred Schwartzwalder, a school janitor and by all accounts not impoverished, had for years engaged in prospecting as a hobby. He found one of the few vein deposits containing high-grade uranium ore near Golden, Colorado.[379] Another, Vernon J. Pick, an electric motor repairman who went out of business in Minnesota when his plant burned down, made a discovery near Razor, Utah, which was eventually sold to the Odlum interests for a trifling $9 million.[380] And still another—the Happy Jack mine found it could not mine the copper which prompted the original location because there was too much uranium in it. This unmitigated blessing netted the discoverers $30 million, it was said.[381]

Reports like these were enough to induce hordes of amateur prospectors[382] to mortgage their homes to buy Geiger counters. The get-rich syndrome appealed to the generation of the fifties as it had to the "poor but honest" miner in 1849. However, few profited as did those mentioned above. Some small operators, claiming that they were being squeezed out by the "big boys," set up the Uranium Miners' Protective Association, a historical hangover from the mining camps of the 1850's.[383] Their difficulty stemmed from the fact that skyrocketing costs of mining and prospecting meant that only a real bonanza would pay off. Uranium companies with quaint Indian names (and even "quainter" financial structures) sprang up overnight, and queues of $20-a-week stenographers filled the streets in front of local stock exchanges to buy stock as low as 1 cent per share. One day during the summer of 1954 over 7 million uranium shares were traded on the Salt Lake Stock Exchange. Timco went up 6,900 percent above its initial offering price.[384] No one seemed to care whether uranium stock was purely speculative. And speculative it was for, even with a strike, it was impossible to tell the extent of the uranium ore in a particular cache. By late 1955 some of the magazines were beginning to talk about the "uranium bust"[385] in a way that was

[378] Jebson v. Spencer, 61 I.D. 161 (1953) (prior permit had expired at the time of location). If the location is not valid at the time of the lease, the lease is good. See, *e.g.*, Webster v. Knop, 6 Utah 2d 273, 312 P.2d 557 (1954); Norris v. United Mineral Products Co., 61 Wyo. 386, 158 P.2d 679, 683 (1945).

[379] The mining locator could without too much difficulty check the records in the Bureau of Land Management to determine whether oil and gas leases or applications had been issued or filed or whether the land was reported valuable for leasing minerals. A lessee or applicant for a mining lease had more difficulty in ferreting out dormant mining claims. It is possible to find location notices in the county recorder's office but it is extremely difficult. The Bureau of Land Management, of course, keeps no records of unpatented mining claims. Even if the mining location is discovered from the records in the county office, there would be no way of determining whether it was valid, i.e., whether the location notice was posted, whether the claim was monumented, whether there had been an actual discovery, etc. See 1 American Law of Mining § 1.35 (Martz ed. 1960).

[380] See 28 Business Week 28-30 (August, 1953); 62 Time 60 (August 3, 1953); 43 Newsweek 100-105 (April 19, 1954).

[381] 64 Time 31 (Dec. 6, 1954).

[382] 64 Time 76 (Sept. 6, 1964).

[383] 66 Time 94 (Dec. 5, 1955).

[384] Lang, *The Coming Thing*, 29 New Yorker 92 (March 21, 1953).

[385] 43 Newsweek 27 (March 22, 1954).

[386] 44 Newsweek 67-70 (Dec. 20, 1954): "Prospectors and promoters descended in a crescendo of newspaper, magazine, radio, and television ads touting uranium stocks which promised fortunes for pennies. Back rooms were transferred into brokerage offices. Local merchants caught the fever. They gave away uranium stock as a sales come-on. Hamburgers were called uranium burgers, ice cream sundaes, uranium sundaes. And, of course, millionaires became uraniumaires."

reminiscent of the miners who had gone out to Colorado in 1859 with "Pike's Peak or Bust" signs on their wagons only to return within a few months with the signs changed to "Busted, by God!" By 1957 it was said that the Atomic Energy Commission was announcing that it had enough.[386] Although these rumors were not true, production did drop off during the sixties, but it is refreshing to sense a note of optimism about uranium in current writing. James K. Groves, a Colorado lawyer who has been in the thick of things since the beginning, recently closed a comment with a refrain heard countless times in the history of American mining: "We ain't seen nothin' yet!" [387] Especially interesting are his statistics—unofficial, of course:

> Since that time [1947] and until June 30, 1966, there has been discovered in the United States, mined, milled and sold to the AEC, 145,379 tons of uranium oxide for an aggregate price of $2,546,126,000. Attention is directed to the difference between tons of uranium oxide, commonly called "yellow cake," and tons of ore. On an average one finds four to five pounds of uranium oxide in a ton of ore. I have been speaking of tons of uranium oxide. The price of $2,546,126,000 paid for uranium oxide is only 6¼ percent of the total sum of $40,772,502,784 thus far appropriated by Congress for the use of the Atomic Energy Commission. Of this uranium oxide, 141,679 tons came from privately owned mining claims and the remaining 3,682 tons came from lands leased by the AEC to private lessees.
>
> As high as 104,000 tons of contained uranium oxide were discovered in one year (1956). At the peak of production in 1960 twenty-five privately owned uranium mills in nine western states were processing 22,000 tons of ore per day. It is estimated that until now there have been 75 million feet of exploratory and development drilling, estimated to have cost $150 million. In order that it might explore for uranium, 982 square miles of public lands were withdrawn at the request of the Atomic Energy Commission.[388]

During the early period of the uranium boom the Atomic Energy Commission conducted no mining operations and apparently only one milling operation. It relied upon private industry[389] for exploration and development of uranium and restricted its activities to purchasing uranium ores and concentrates. Bonuses to stimulate exploration were awarded.

Stop-Gap Legislation. The conflict between the location and leasing systems was the subject of congressional relief legislation in what was popularly referred to in the trade by its chapter number in the statutes, Public Law 250.[390] The basic provisions of the act met with the approval of the mining industry as well as the Interior Department and the Atomic Energy Commission. Although it was intended primarily to afford relief to uranium locators on segregated land, the statute provided a procedure for validating "any mining claim" located between July 31, 1939, and January 1, 1953, if at the time of location the land was included in a permit or lease, or application or offer therefor, issued under the Leasing Act of 1920, or was known to be valuable for minerals subject to disposition under the Leasing Act. The first date was selected arbitrarily as the approximate time when vanadium development for defense purposes began on the Colorado Plateau.[391] The origin of the January 1, 1953, date is not so clear. The original bill in the House used the date on which it was first introduced, March 20, 1953. This was changed with-

[386] 81 AMERICAN MERCURY 34 (September 1955).

[387] 42 LIFE 23 (Feb. 18, 1957).

[388] Groves, *Uranium Revisited*, 13 ROCKY MT. MIN. L. INST. 87, 114 (1967). See also Lewis and Rooker, *Domestic Uranium Procurement—History and Problems*, LAND AND WATER REVIEW 449 (1966).

[389] *Id.* at pp. 87-88. See also ANNUAL REPORT, ATOMIC ENERGY COMMISSION 1967 23-28 (1968).

[390] An interesting pictorial coverage of the mining and milling processes will be found in 42 LIFE 23 (Feb. 18, 1957).

[391] URANIUM RELIEF ACT, 67 STAT. 539 (1953), 30 U.S.C. § § 501-505 (1964).

[392] See UNITED STATES CODE CONG. AND ADMIN. NEWS, 83d Cong., 1st Sess. 2347 (1953).

out comment to January 1 in an amendment offered by Representative Dawson of Utah.[392] The conference committee which later approved the House version did not comment on the change.

Under the act, owners of mining claims were required within 120 days after its passage to post an amended notice of location on the claim and to record this notice in the office where the certificate of location was on file. The notice was required to state that it was filed for the purpose of obtaining the benefits of Public Law 250. Any mining claim so validated was subject, however, to a reservation of Leasing Act minerals and to a right of the Federal government or its lessees to use so much of the surface or subsurface as might be necessary for prospecting or mining of such minerals.

The law failed to provide for future locations on segregated land, one of its principal defects. It should be noted that a validated location in no way affected the validity of an oil and gas lease or application, regardless of when the latter was issued or filed.

Even before the enactment of Public Law 250, the Atomic Energy Commission had actively encouraged uranium prospecting and had also issued some uranium leases on public lands. Formal regulations were not announced until February 10, 1954.[393] These provided the procedure for obtaining Circular 7 uranium leases. This program, it was hoped, would solve some of the problems created by the conflict with the Leasing Act. The new leasing system clumsily combined elements of both the location and leasing laws and ultimately proved to be burdensome to the Atomic Energy Commission as well as the uranium industry.[394] The system was studied by an interindustry committee in cooperation with the Interior Department and the Atomic Energy Commission. The result was Public Law 585, discussed below. Few leases were actually issued, and many of these were converted into mining claims under Public Law 585. In 1954, Circular 7 leasing was terminated.[395]

The Multiple Mineral Development Act of 1954—Public Law 585.[396] This statute reflects the contemporary policy of the Federal government to foster a system of multiple use for Federal mining lands. Like Public Law 250, it established a complicated validation procedure which has largely academic significance today. The more lasting features involved a comprehensive statement for the resolution of problems of multiple use and the so-called "section 7 proceedings" which have the effect of barring an unpatented mining locator from asserting rights to the Leasing Act minerals.

The validation or priority provisions[397] reaffirmed the procedure of Public Law 250 which required that locations on segregated land prior to January 1, 1953, be "relocated" within the 120-day period. Claims which were invalidated through failure to take the prescribed steps could not be revived under the new act. Vulnerable locations made between January 1, 1953, and February 10, 1954 (the effective date of the Circular 7 leasing regulations), could be perfected by taking the necessary validating steps within 120 days from August 13, 1954, the effective date of Public Law 585. However, mining claims located between February 10, 1954, and August 13, 1954, were void because of the hiatus between the cutoff date and the effective date of the act. However, if the locator had applied for a Circular 7 lease during this

[392] 99 CONG. REC. 9968-69 (1953).
[393] 19 FED. REG. 764 (1954).
[394] Note, 24 GEO. WASH. L. REV. 319, 330 (1956).
[395] 19 FED. REG. 7365 (1954).
[396] MULTIPLE MINERAL DEVELOPMENT ACT, 68 STAT. 708 (1954), 30 U.S.C. § § 521-31 (1964).
[397] See 1 AMERICAN LAW OF MINING § 1.40 (Martz ed. 1960).

period, he could convert it into a mining location. All locations made after August 13, 1954, on either segregated or unsegregated land are valid, but all such locations are expressly subject to a reservation of Leasing Act minerals. Only mining patents issued after the segregation are required to contain such a reservation, so that the locator will be more likely to go to patent if at the time there are no outstanding leases or applications.

Before Public Law 585, the oil and gas lessee had considerable difficulty determining whether there were outstanding dormant mining claims which might cloud his title. Since the government does not warrant its title to leased property, the lessee has the burden of making this determination. It is possible that he might have the right to initiate a private contest proceeding but that would require some knowledge of the locators whose claims are in question. The new act provided an in rem procedure—Section 7 proceedings—which title examiners may on occasion have to rely upon. A brief statement of the procedure contemplated by the act will suffice for present purposes.[398] The lessee must first file in the proper county office where the land is located a notice of the fact that a lease has been issued. After 90 days the lessee may file with the Bureau of Land Management a request for publication of the notice. This must be accompanied by a certified copy of the recorded notice, an affidavit that an investigation has been made of persons in possession, and a certificate from an abstracter or attorney based upon an investigation of county records. Names and addresses of persons in possession or who claim an interest under unpatented mining claims are required to be divulged. Anyone asserting a right to Leasing Act minerals must file with the land office, within 150 days from the first publication, a verified statement setting forth information about his claim. Copies of the published notice must be served personally or by registered mail on persons in possession or listed in the abstracter's certificate. A failure to file the verified statement within the 150-day period raises a conclusive presumption of waiver of any claim to Leasing Act minerals. Where a statement is filed, an administrative hearing is held to determine the validity of the mining locator's right to Leasing Act minerals. These statutory provisions are, of course, supplemented by departmental regulations.[399] Questions of the constitutionality of the published notice provisions have not as yet been considered by the courts.[400]

Multiple Use. The concept of multiple concurrent uses of Federal public land is not a new concept in the mineral context. It will be remembered that as early as 1907 President Theodore Roosevelt recommended that in the case of the mineral fuels legislation should be enacted to provide for "title to and development of the surface land as separate and distinct from the right to the underlying mineral fuels . . ."[401] After his administration, several Federal statutes expressly adopted his suggestion. A series of statutes between 1909 and 1912 permitted nonmineral entries on coal lands and authorized the issuance of limited patents.[402] In 1912, surface entries on oil and gas land in Utah were permitted.[403] This was extended in 1914 to other states.[404] The Stockraising Homestead Act in 1916 authorized prospecting for and mining of minerals re-

[398] See TRELEASE, BLOOMENTHAL AND GERAUD, CASES ON NATURAL RESOURCES 713-14 (1965); 1 AMERICAN LAW OF MINING § 1.42 (Martz ed. 1960).

[399] 43 C.F.R. § § 3542.1-3545 (1967).

[400] See 1 AMERICAN LAW OF MINING 116-20 (Martz ed. 1960).

[401] See Part 2, n. 203 and text.

[402] See Part 2, n. 215, 216, 300.

[403] See Part 2, n. 301.

[404] See Part 2, n. 302.

served to the Federal government.[405] The Taylor Grazing Act[406] in 1934 expressly provided that mining and prospecting might continue in grazing districts organized under the act. Although other examples in the fifties exist, these will be considered below. One significant contribution of Public Law 585 was the multiple-mineral development provisions which attempted to reconcile conflicts which may arise when land is used for Leasing Act operations as well as the mining of solid minerals.[407] It is interesting to compare these provisions with an early statute which also attempted to resolve similar problems.[408]

The sixth section of the act opens with the statement that each kind of mining shall be conducted "so far as reasonably practicable" in a manner compatible with the multiple-use concept. Two standards of conduct are adopted: one dealing with damage to minerals, the other with damage to existing improvements. As for the first, liability of a locator may arise even though in fact there is no multiple use, *i.e.*, no oil and gas lease or permit has been issued. The converse is also true, of course. Each must act "so far as reasonably practicable" in a manner which will avoid damage to the minerals of the other.

A stricter standard of conduct is set up with reference to existing improvements on the land. The operations of each are required to be conducted so as not to endanger or "materially" interfere with existing surface or underground improvements. Where damage to existing improvements cannot reasonably be avoided, the courts are authorized to resolve the conflict by providing for compensation for the injured party. In order to award fair compensation, the court must first find that the injury or damage which would result from denying the particular use outweighs the injury or damage to the existing improvements. This would seem to be essentially a "balancing-of-the-interests" technique. In lieu of present compensation, the court may authorize security. The statute also sets up a system whereby the operators may be required to exchange information relating to their respective operations.

Although the standards of liability are very broad, they do not seem to be more illusive than the rules of negligence in tort law. It is regrettable that there are no judicial decisions construing the act.

Action and Reaction

Since 1955, Congress has enacted some important legislation affecting mining on the public lands in addition to the multiple-mineral development statutes discussed in the previous section. Much of this legislation was provoked by an honest feeling that a great many unpatented mining claims were being used, to the financial detriment of the United States, for purposes quite unrelated to mining and that valuable surface materials were being lost because of the exclusive right to the possession of the mining claim which miners have traditionally enjoyed. Moreover, during this period, the Interior Department has displayed commendable aggressiveness in attempting to correct violations of what might be called the "spirit" of the mining laws. It is something of an understatement to say that the latter crusade has produced at times an indignant reaction from the mining industry. The government-industry disputes cannot be the subject of this section, however, because for one thing much of the disagreement can be relegated to the category of

[405] 39 STAT. 862 (1916), 43 U.S.C. § § 291-301 (1964).
[406] 48 STAT. 1269 (1934), 43 U.S.C. § 315 (1964).
[407] 68 STAT. 708 (1954), 30 U.S.C. § 526 (1964).
[408] See Part 2, n. 216.

what laymen like to call "lawyer's law." Second, several areas of conflict have been rendered more or less obsolete by recent Supreme Court decisions. A few of the principal differences will, however, be noted briefly here.

A great deal of ink has been consumed in recent years defining what constitutes a discovery of valuable minerals under the Mining Law of 1872. To the industry, there was no greater heresy than the suggestion that there ought to be some reasonable relationship between the commercial value of the mineral (including nonmetallics) and the validity of a mining claim. Whatever may be said about the *stare decisis* aspect of the controversy, it must be noted that the Supreme Court has recently held, without dissent, that commercial marketability is indeed an aspect of "discovery."[409] Viewed in the light of conditions at the time of the enactment of the mining law in 1872, this is not without justification. Slightly irrelevant, perhaps, is the fact that in 1872 a miner was required to spend $100 annually on assessment work to prevent a claim from being relocated. Considering the fact that his average hourly wage in 1890 was 20 cents, a "prudent" miner would think twice before spending $100 on surface development if his mineral had no commercial value in the community.[410] The Supreme Court did not, of course, consider this type of evidence in construing the statute but preferred to place its decision on the ground that in fact there had been no departure from the traditional definition of "discovery" in recognizing the element of marketability.

Another source of disagreement has been the extent to which the Department of the Interior could cancel by administrative action oil and gas leases which had been erroneously issued in violation of applicable leasing regulations or laws. Although a great many problems remain in this area,[411] some were foreclosed by a Supreme Court decision in 1964 upholding the power of cancellation in connection with violations existing at the time of the issuance of the lease.[412]

Another latent problem has been the extent to which the Mining Law of 1872 should be modified to deal with 20th-century mining problems. A great many articles have appeared with suggestions which would either promote the objectives of the industry[413] or the government.[414] Strangely enough, it has even become fashionable[415] for the industry to suggest that in some respects the mining law is obsolete. To our knowledge, the mining people have not yet suggested that leasing is a preferable alternative. It is hoped that some of the observations in earlier parts of this discussion may be helpful in making this basic policy decision. Other studies which have been undertaken for the Public Land Law Review Commis-

---

[409] United States v. Coleman, 88 Sup. Ct. 1327 (1968).

[410] The observation is made in O'Callaghan, *The Mining Law and Multiple Use*, 7 NAT. RES. J. 242, 248 (1967).

[411] See TRELEASE, BLOOMENTHAL AND GERALD, CASES ON NATURAL RESOURCES 654-55 (1965).

[412] Boesche v. Udall, 373 U.S. 472 (1963).

[413] For some of the more recent, see Hansen, *Why a Location System for Hard Minerals?* 13 ROCKY MT. MIN. L. INST. 1 (1967); Ladendorff, *Suggestions for Congressional Action Relating to the General Mining Law*, 11 ROCKY MT. MIN. L. INST. 441 (1966); Twitty, *Amendments to the Mining Laws*, 8 ARIZ. L. REV. 63 (1966). On Federal oil and gas leasing, see Christy, *The Future of the Mineral Leasing Act — Suggestions for Consideration in Amendments to the Mineral Leasing Act of February 25, 1920*, 11 ROCKY MT. MIN. L. INST. 369 (1966).

[414] Pearl, *Projected Impact of Pending Proposals to Review the Mining Laws*, 9 ROCKY MT. MIN. L. INST. 1 (1964).

[415] The term is borrowed from Sherwood and Greer, *Mining Law in a Nuclear Age: The Wyoming Example*, 3 LAND AND WATER L. REV. 1, 3 (1968).

sion will presumably supply the necessary empirical data on which to determine the advisability of changes in the location law.

In the area of the administrative procedures of the Interior Department and particularly the Bureau of Land Management, there has also been disagreement between the government people and the industry. It is optimistic to assume that this type of disagreement will ever be completely solved to the satisfaction of both sides. These are matters on which it is impossible to pass judgment here.

Surface Resources and Common Varieties. Congress enacted the Surface Resources Act in 1947 which authorized the Secretary of the Interior to remove and sell certain surface vegetative minerals from public lands if such disposal would be in the public interest and was not otherwise expressly forbidden by any special act.[416]

In 1955, in the so-called "Common Varieties Act,"[417] it amended the earlier statute to include mineral materials, such as "but not limited to" common varieties of "sand, stone, gravel, pumice, pumicite, cinders, and clay." The Secretary of Agriculture was given similar powers with respect to land under his jurisdiction. More important for present purposes, the amendment expressly provided that the above "common varieties" are not, after July 23, 1955, to be deemed valuable mineral deposits within the meaning of the location law. In 1962, deposits of petrified wood were also included. A matter of special significance is the statement that unpatented mining claims after July 23, 1955, cannot be used for purposes other than prospecting, mining, and processing. The amendment expressly permits locations based on valuable minerals which might be associated with the enumerated common varieties. Also, the term "common varieties" does not include deposits of the stated minerals which possess some "distinct and special value," *e.g.*, "block pumice" which is expressly excluded. Departmental regulations explain the distinct and special value criterion.[418] The Supreme Court has recently held that the common-varieties amendment has impliedly superseded the 1892 Building Stone Act to the extent that ordinary quartzite stone which in this case was found in immense quantities in the general area of a claim is no longer within the location laws.[419]

Although the 1955 statute was not applicable to prior perfected locations because under the 1872 mining law these locators had the "exclusive right of possession and enjoyment of all the surface" within the boundaries of their locations, the act did authorize an in rem proceeding under which prior unpatented mining claimants are required to assert their claims or forfeit any surface rights which might conflict with the government's right of removal. The proceeding is obviously patterned after the similar procedure in the Multiple Mineral Development Act, discussed in the previous section. The purpose of the provision is, of course, to enable the government to dispose of surface resources of immense value on dormant mining claims. The procedure is apparently used extensively although there has not been much litigation.[420]

Withdrawals. In recent years, there appears to be growing dissatisfaction in the mining industry with the Interior

[416] 61 STAT. 681 (1947).

[417] 67 STAT. 367 (1955), 30 U.S.C. §§ 601-615 (1964).

[418] 43 C.F.R. § 3511.1 (1967).

[419] United States v. Coleman, 88 Sup. Ct. 1327 (1968). This result was predicted in 1 AMERICAN L. OF MIN. § 1.19 (Martz ed. 1960).

[420] See Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966) (apparently on appeal). See generally, Barry, *Determination of What Constitutes "Common Varieties,"* 12 ROCKY MT. MIN. L. INST. 225 (1967).

Department's extensive withdrawals of public lands. Withdrawals for wildlife refuges particularly have been considerable. Many withdrawals were under the independent power of the Executive and have the effect of removing the land from location or leasing. The congressional reaction to withdrawals for defense purposes led to legislation in 1958.[421] Reminiscent of the restrictions placed on Executive withdrawals for timber reservations during the Theodore Roosevelt administration, the statute provides (with certain exceptions) that no withdrawal from settlement, location, sale, or entry of more than 5,000 acres of the public lands for any one defense project shall be valid except by act of Congress. The last section of the act states that all previous and future withdrawals (except the naval, oil, oil shale, and coal reserves) for the use of the Defense Department shall be deemed to be subject to the condition that all minerals, including oil and gas, in such lands shall be under the jurisdiction of the Secretary of the Interior. Such minerals shall not be explored for or disposed of except under the applicable public land mining and mineral leasing laws. Exploitation for minerals will not be allowed, however, where the Secretary of Defense, after consulting with the Secretary of the Interior, determines that mineral development or exploration would be inconsistent with the military use of the lands withdrawn or reserved.

Shale Oil. In recent mining history, nothing has caused as much excitement in the oil industry as the commercial potential of the vast oil shale deposits in the Green River Formation in Utah, Colorado, and Wyoming. There seems to be little question at the present time that oil can be produced from the shale in the near future at a cost which will be competitive with the ordinary production of crude oil from liquid reservoirs.[422] Whether the known oil shale deposits owned by the Federal government should be turned over to private oil companies for exploitation is a matter which has generated considerable debate. Even if this question receives an affirmative answer, there is no agreement on the conditions which should be attached by the government or the benefits which should be accorded the industry for making an investment of this magnitude.

Since the estimated value of our oil shale deposits runs into trillions of dollars, it is not surprising that some very searching questions must be answered before policy decisions can be reached. The public has been relatively apathetic about oil shale. It is true that there have been charges that there is a scandal in the offing which "makes the Teapot Dome look like a tea party,"[423] but on the whole, there has been relatively little discussion of the problem in the newspapers and magazines.[424] Any comparison to Teapot is, of course, absurd because there has been no aura of secrecy surrounding the oil shale question, and the bitterest critics of the government's oil shale policy seem to be rather poorly informed on the history of the problem.

To enable him to reach an informed judgment on the exploitation of oil shale, Secretary of the Interior Udall appointed an advisory board of private citizens in 1964 to make recommendations. The board consisted of the president of Re-

[421] 72 STAT. 27 (1958), 43 U.S.C. §§ 155-58 (1964).

[422] de Nevers, *Tar Sands and Oil Shales*, SCIENTIFIC AMERICAN, February 1966, p. 21; Kelly, *Oil Shale: 1964 or 1984*, WESTERN RESOURCES CONFERENCE 237 (1964).

[423] J. R. FREEMAN, *The World of Oil Shale*, THE TEXAS OBSERVER, Jan. 12, 1968, 1, 4 is the most extreme indictment in print. The author alleges that as a result of his crusade against oil shale leasing, he has been subjected to burglarizing of his files as well as gunshots at the rear of his automobile.

sources for the Future, Inc., a president of the Colorado School of Mines, two attorneys in private practice in different parts of the country, a Harvard University economist, and a foreign investment counselor from Arizona. Their "interim" report was cautious.[425] Although it was urged that the Federal oil shale policy should promote a competitive shale industry and encourage research in technology and the conservation problems which arise in connection with processing oil shale, still the board reached no consensus on the question of opening the Federal lands to private leasing. Individual members of the board presented their own views on the desirability of immediate leasing. Of these, the position of John Kenneth Galbraith, the Harvard University economist, has received the most attention.[426] Essentially he recommends no leasing until government-sponsored research has revealed what sort of return the government might reasonably expect from leasing. Most of the others favored some degree of leasing as well as private research agreements. In May 1967,[427] Secretary Udall issued rules relating to leasing and proposed regulations which implemented his five-point program to open up the federally owned oil shale, announced 4 months earlier. The program can be only briefly noted here, and what follows is a most over-simplified statement of what is being considered. After suggesting that title controversies be cleared as rapidly as possible, he advocated a program of private exchanges to promote the blocking up of known oil shale lands in private or Federal ownership. The objective is to consolidate in one form of ownership sufficiently large blocks to create an economic-sized unit. The Secretary also has proposed regulations for research and development contracts for a very small portion of the oil shale deposits, for joint Interior, AEC, and private in situ[428] experiments, and for accelerated research by the Interior Department in technology and conservation practices and health safeguards.

For the lawyer, the title controversies referred to above are of unusual interest.[429] It will be remembered that prior to 1920, oil shale locations could be made under the Placer Law of 1897. Because of a minor oil shale boom after World War II, perhaps as many as 150,000 shale locations were made on the Federal land presently involved. The 1897 Act permitted the locator to obtain a patent, and it has been estimated that as much as one-fourth of the Federal oil shale lands have passed into private ownership in this manner. When oil shale became exclusively leasable after the Mineral Leasing Act of 1920, a few—very few—leases were issued in the

[425] An interesting account is Duscha, *Bonanza in Colorado—Who Gets It?* ATLANTIC MONTHLY 82 (March 1966), and Welles, *Oil Shale: Hidden Scandal or Inflated Myth?*, HARPER'S (August 1968).

[426] OIL SHALE ADVISORY BOARD, INTERIM REPORT (1965).

[427] Reprinted in 2 LAND AND WATER L. REV. 51 (1967).

[428] 32 FED. REG. 7086 (1967), proposed to amend 43 C.F.R., Subpart 3170 (1967).

[428] *I.e.*, retorting the oil shale in place, a process which would eliminate the expense involved in transporting the shale to the retort where it decomposes into oil shale.

[429] The two best general articles are Note, 19 STAN. L. REV. 190 (1966) and Note, 51 MINN. L. REV. 1154 (1967). See also Dominick, *Oil Shale—The Need for a National Policy*, 2 LAND AND WATER L. REV. 61 (1967). For discussions of specific aspects of the oil shale question, see Anderson, *Acquiring Rights to Minerals Associated With or Contained in Oil Shale*, 13 ROCKY MT. MIN. L. INST. 233 (1967); Cameron, *Current Problems in Oil Shale Development*, 10 ROCKY MT. MIN. L. INST. 339 (1965); Delaney, *Water for Oil Shale Development*, 43 DENVER L. J. 72 (1966); Miller, *Impediments to Oil Shale Development*, 35 U. COLO. L. REV. 171 (1963); Reidy, *Do Unpatented Oil Shale Mining Claims Exist?* 43 DENVER L. J. 9 (1966); Note, 5 LAND AND WATER L. REV. 75 (1968) (discussing the "reserved water" doctrine and its application to oil shale development).

decade which followed. The Leasing Act did not, of course, affect perfected shale locations made prior to 1920. In 1930, President Hoover withdrew all the Federal oil shale land from leasing, although unpatented locations remained valid. The Executive withdrawal is still in effect, but the Secretary of the Interior has power to reopen the shale land if he chooses to do so. It is the dormant pre-1920 placer claims which presently cloud the title to the Federal land, although actually these claims are on a relatively small portion of the Federal shale land. Between 1929 and 1933, the government attempted to eliminate thousands of unpatented oil shale claims in contest proceedings or in applications for patents. It based its case largely on the fact that the annual assessment work on these claims had not been performed. It lost on this ground when the Supreme Court held that the failure to perform assessment work did not result in forfeiture of the claims but merely made them vulnerable to relocation by other mining locators.[430] But, since locations and relocations could not be made after 1920, these pre-1920 locations continued to exist without visible evidence of any actual development, and it has been difficult indeed for the government to determine what shale land is subject to these outstanding placer claims. The Department as late as 1961 admitted that the contests between 1930 and 1933 were not valid in view of the Supreme Court's decision in 1935, and for many years it issued patents to these placer claimants. In 1964, it took quite a different position and urged that in the administrative cases in the early thirties which were not appealed, the decisions enjoyed the usual finality accorded to judicial judgments.[431] Encouraged somewhat by language in the second Supreme Court opinion, the government urged that these claimants were subject to the rules of res judicata, estoppel and laches and that it could at least assert that these claims had in fact been abandoned. So far the government has not prevailed.[432] There is even some possibility that oil shale patents may be collaterally attacked.[433]

There have been suggestions that legislative action might be taken to obliterate these dormant placer claims. One avenue might be noted here because it has been discussed in some detail in the previous section, *i.e.*, the use of "Section 7" proceedings under Public Law 585.[434] This will have limited use.

The final story of the Federal oil shale land is in the future. Every indication is that it will be a colorful one.

Classification; The Public Land Law Review Commission. The process of classification of public lands has always been troublesome. Some notable steps have been made in this direction in recent years. In the Classification and Multiple Use Act of 1964,[435] Congress directed the Secretary of the Interior to review public lands under his jurisdiction with a view to determining what lands should be retained in public ownership and which land might be disposed of for community development and other purposes. The Secretary is also authorized to sell land for community development and growth under the Public Land Sale Act.[436] The Classification Act also expressly recognizes the principle that retained lands should be managed for multiple use, and the

[430] See Wilbur v. Krushnic, 280 U.S. 306 (1930) and Ickes v. Virginia-Colorado Dev. Corp., 295 U.S. 639 (1935).

[431] Union Oil Co., 71 I.D. 169 (1964).

[432] Oil Shale Corp. v. Udall, 261 F. Supp. 954 (D. Colo. 1966). It is not known whether this case is on appeal.

[433] See Lohr, *Conclusiveness of United States Oil Shale Placer Mining Claims*, 43 DENVER L. J. 24 (1966).

[434] See note 398, *supra*, and text.

[435] 78 STAT. 986 (1964), 43 U.S.C. § 1411 (1964).

[436] 78 STAT. 988 (1964), 43 U.S.C. § 1421 (1964).

production of minerals is specifically named as one such use. Regulations have been published. Although classification may have the effect of segregating land from mining, the regulations provide that this is not to occur "unless the nonmineral uses would be inconsistent with and of greater importance to the public interest than continued search for a deposit of valuable minerals."

The Public Land Law Review Commission is currently charged with the responsibility of making concrete recommendations to the Congress on the extent to which public lands should be retained and managed by the Federal government or disposed of in a way which will provide maximum advantages to the general public.[437] Similar commissions existed in 1879 and 1903.[438] It is expected that the present Commission will make some lasting recommendations.

The conflict between public and private interests in the Federal public lands creates problems of enormous scope.[439]

The New Conservation

For the Progressives of the Theodore Roosevelt era, mineral conservation quite understandably meant saving for a future generation, with little attention paid to current wasteful and uneconomic practices. The second and third decades of this century witnessed the effects of an under-regulated industry exploiting oil and gas resources in a manner unparalleled in the history of public land law. This was true despite the "closing" of the reserves between 1910 and 1920. The same situation prevailed in private production of oil and gas. Alarmed at wasteful practices, depletion and over-production, President Coolidge set up the Federal Oil Conservation Board in 1924 to work with the industry on conservation. Unimpressed with the accomplishments of the board (as a member, he was aware of its shortcomings), President Hoover, it will be remembered, announced a policy of complete conservation of public oil and gas during his administration. His program for government-industry cooperation was quite successful, and production was considerably decreased.[440]

Compared with the history of mineral conservation, the national forests have long been the subject of careful conservation techniques by the Forest Service of the Department of Agriculture. Due perhaps in part to favorable congressional appropriations, the Forest Service's record has been impressive. With the Taylor Grazing Act in 1934, the government began to take a close look at another of the natural resources of the West, the grazing lands, a resource which Theodore Roosevelt had wanted to classify as a "public utility" as early as 1905. In 1934, the condition of the grazing lands was a national scandal. Under the new act, the Department of the Interior was able to inaugurate what might be termed "the period of aggressive management." The Department had had an impossible assignment for nearly a century. Grossly understaffed, it was totally unable to handle the congressional profligacy of the 19th century. And, although Secretary Garfield's tenure during the Roosevelt administration was eminently successful, this was closely followed by the famous Ballinger-Pinchot controversy in which the Department was perhaps most unfairly dealt

[437] 78 STAT. 982 (1964), 43 U.S.C. § 1391 (1964). See generally Phipps, *The Public Land Law Review Commission—Identifying and Defining the Problems*, 2 LAND AND WATER L. REV. 231 (1967).

[438] REPORT OF THE PUBLIC LANDS COMMISSION, EXEC. DOC. No. 46, 46th Cong., 2d Sess. (1880); SEN. DOC. No. 188, 58th Cong., 2d Sess. (1904) and SEN. DOC. No. 154, 58th Cong., 3d Sess. (1905).

[439] For a detailed study, see Bennett, *Public Land Policy: Reconciliation of Public Use and Private Development*, 11 ROCKY MT. MIN. L. INST. 311 (1966).

[440] Swain, *Federal Conservation Policy 1921-1933*, 76 U. OF CAL. PUB. IN HISTORY 53-72 (1963).

with by the dedicated Pinchot conservationists. If that was not enough, Secretary Lane's later hassle with Navy Secretary Daniels over the naval reserves did little to improve the Department's public image. The final blow came with Secretary Fall's involvement in Teapot Dome. It is fortunate that the office eventually came into the capable hands of Secretary Ray L. Wilbur in the Hoover administration. Since that time, Interior has earnestly functioned at a level of efficiency far beyond what its early history might have predicted.

As part of the period of aggressive management, the post-war years saw the introduction of the concepts of multiple-mineral development and multiple surface use as part of the conservation program for mineral land. The war against dormant and fraudulent mining claims and oil and gas leases which violated provisions of the Leasing Act was a major aspect of the program of the Bureau of Land Management.

There emerged in the fifties quite a different concept of conservation—the notion that man must, before it is too late, put aside areas of wilderness, even though this means an end to the traditional forms of exploitation which had "closed" the western frontier. This was hardly a new concept, however, for as Roderick Nash has recently recounted, the preservationists have a long and interesting role in the conservation movement in this country.[441] Their success in molding public opinion resulted in the enactment of the Wilderness Act in 1964,[442] atfer lengthy congressional hearings in which its advocates defended attacks from the mining industry as well as many professional conservationists in government circles. The act provides that national forest lands classified as "wilderness" under the act remain subject to the Federal mining and leasing laws until December 31, 1983. Any mining patent issued after passage of this law and subject to valid existing rights at the time of passage must, however, contain a reservation to the United States of title to the surface. After January 1, 1984, minerals in all wilderness lands are withdrawn from all forms of appropriation under the mining and leasing laws. Access to the forest wilderness areas is subject to reasonable regulation by the Secretary of Agriculture.[443] Wilderness areas within national parks, national wildlife refuges and game ranges are within the jurisdiction of the Department of the Interior.

It is ironic that the preservationists are now faced with a demand for mass public recreation which may eventually destroy the very things they have wanted to perpetuate. As Mr. Nash puts it: "Having made such remarkable gains in the public's estimation in the last century, wild country could well be loved out of existence in the next."[444]

---

[441] NASH, WILDERNESS AND THE AMERICAN MIND (1967). A bibliography of wilderness literature appears at 237-46.

[442] 78 STAT. 890 (1964). 16 U.S.C. § 1131 (1964). The 1964 legislation established a wilderness preservation system of around 9.3 million acres. Committee hearings are currently being held on proposals to add additional land in New Jersey, Florida, Massachusetts, Michigan, Wisconsin, and Maine. DES MOINES REGISTER, June 17, 1968, p. 12.

[443] 36 C.F.R. § 251.82-251.84 (1968).

[444] NASH, *supra* note 441, at 255-56.

The wilderness concept is in fact dwarfed by the broader objectives of the "new conservation" program of President Johnson. It was earlier described by Secretary of the Interior Udall in *The Quiet Crisis*.[445] The program is something to which the mining community will eventually have to adjust.[446] The "new conservation" has never been more eloquently defined than in the President's message to Congress on February 8, 1965:[447]

> Our conservation must be not just the classic conservation of protection and development, but a creative conservation of restoration and innovation. Its concern is not with nature alone, but with the total relation between man and the world around him. Its object is not just man's welfare but the dignity of man's spirit.

[445] UDALL, THE QUIET CRISIS (1963). See also DOUGLAS, A WILDERNESS BILL OF RIGHTS, BRITANNICA BOOK OF THE YEAR, 1965.

[446] See Clyde, *Legal Problems Imposed by Requirements of Restoration and Beautification of Mining Properties*, 13 ROCKY MT. MIN. L. INST. 187 (1967).

[447] 111 CONG. REC. 2085 (1965).

Summary

American land policy from Independence to the end of the 19th century had four objectives inherited from the colonial period: (1) to produce revenue for the government; (2) to facilitate the settlement and growth of new communities; (3) to reward veterans of wars; and (4) to promote education, the establishment of eleemosynary institutions, and the construction of internal improvements by grants of land. Spokesmen for all four of these objectives were to clash over the relative importance of each and were to cause the adoption of measures that were inharmonious and incongruous with others.

The need to refund the heavy debts contracted during the Revolution which went unpaid under the Confederation, induced Thomas Jefferson, the agrarian radical, Alexander Hamilton, the fiscal conservative, and Albert Gallatin, who represented a midway position between the views of the two, to agree to pledge the income from land sales for the retirement of the debt. The public lands were to be sold and the proceeds "appropriated toward sinking or discharging the debts . . . and . . . applied solely to that use." This solemn pledge of August 4, 1790, and of April 1798 was to hold Congress to a revenue policy until the debt was retired. Land was to be sold in large tracts at competitive bidding on a wholesale basis and it was expected that the buyers would then retail it out to small farmers in the way that James Fenimore Cooper was retailing land on the New York frontier.

Agrarian followers of Jefferson disliked the emphasis upon revenue in the disposal of the public lands. They agreed with him that "the small landholders are the most precious part of a State" and that "vast grants" or large ownerships tending toward "monopolies" were wrong. They wished to give the common man easy access to the public land and the chance to acquire ownership out of the capital they accumulated from cultivating it. This involved permitting settlers to search out attractive locations, to improve them, and after a few years to preempt them at the minimum price. Frontier settlers wanted no speculators buying at a competitive sale and therefore they demanded the right of preemption and wanted the public land reserved for farm makers. Failing that, they wanted sales postponed as long as possible to give them time to accumulate the $200 for their quarter-section and to assure that settlers took up most of the land. At the same time they wanted no restrictions placed on the areas into which they might move and urged the speedy removal of the Indians from desirable areas and the rapid survey of the lands.

In addition to these advocates of a wide-open land system that would permit individuals to settle wherever they wished, there was another element of the population concerned with the business in land, timber, and minerals. No one has essayed a history of the land business but when one thinks of the number of speculators, land agents, landlookers, timber cruisers, dealers in land warrants, scrip, and tax titles, and lawyers who were absorbed in these frontier occupations, and of the fortunes that were made and lost in land specula-

tion, it is easy to see that the influence of these classes was large. Persons engaged in the land business wanted no restrictions placed in their way of profit, no regulations such as were suggested by the Commissioner of the Land Office at one time, no investigations of their activities. On the positive side they favored legislation that would attract immigration, provide internal improvements and encourage statehood, and they joined with pioneer settlers in booster activities that would stimulate a demand for land and a rise in its value.

The third objective of using the public lands to reward veterans of past wars was pursued generously by Congress. Even if they had served only a few days, veterans of all wars through that with Mexico were given warrants they could exchange for land, first in military tracts, later anywhere there was public land open to entry. True, the maximum grant of 160 acres, which was given to officers as well as men, was small in comparison with the more generous bounties officers had received in the colonial period, but in a more democratic age the old disparities between ranks seemed less desirable. The great majority of the warrants were sold at well below the government-minimum price for land, thereby reducing the cost of land for speculators and such settlers as acquired them.

Very early the public land states began to exhibit disenchantment with Federal ownership, administration, and determination of policy concerning the public lands. They recalled that they were admitted into the Union "on an equal footing with the original states, in all respects, whatever," and yet were denied ownership of the ungranted land within their boundaries, whereas Massachusetts and all others of the Original Thirteen had retained the ungranted lands within their boundaries. Furthermore, the new states had been required to make a compact that they would not tax the newly granted lands for 5 years after they were sold. To win the acceptance of such compacts the new states were offered one thirty-sixth of the public lands within their borders for schools and smaller grants for other purposes. No state was content with such a bargain. Some tried to induce the Federal government to cede its lands to them; others strove to gain larger donations and over the course of years Congress did become increasingly liberal. School donations were increased from one section in each township to two and finally to four, large grants were given for agricultural colleges, and, most important, for the construction of roads, canals, and railroads, the dredging and improvement of navigable rivers, and for irrigation. The states having found a way of gaining ownership of a portion of the public lands came forth with many proposals for internal improvements, some dubious to say the least. Most questionable was the donation of the swamplands to the states which were expected to drain them—something that strict constructionists thought the Federal government lacked the power to do.

Grants for public schools, for roads, canals, and railroads could be justified, said those who always searched for specific authorization in the Constitution for any action they might favor, on the ground that they would enhance the value of the remaining lands and thereby bring to the government as great a return as if no land had been given away. By giving one half the land in alternate sections for internal improvements and raising the price of the reserved sections to the double-minimum there would be no loss. Congress, having found a nearly perfect rationalization for grants it wished to make, was willing to vote huge grants to the transcontinental railroads in 1862-71.

Through the granting process Congress was experimenting with bounties, subsidies to worthy objects that could not be achieved, at least not at that time, without

Federal aid in the form of public lands. In voting these bounties it was slowly expanding its own vision of America's destiny and of the powers of the national government under the Constitution. It was the Federal government that built the National Road in Ohio, roughly Route 40 today, and made possible the Illinois and Michigan Canal, the predecessor of the Chicago Drainage Canal, and the most widely used Soo Canal. It was the Federal government that made possible early construction of the Union Pacific, the Northern Pacific, the Santa Fe, and the Southern Pacific Railroads. It was the Federal government that provided a source of funds for common schools in frontier communities and initiated moves for the establishment of the great state universities. These Federal land grants made necessary the creation of state and railroad land departments to sell these grants at the highest price obtainable if the purposes for .which they were given were to be achieved. In the 1850's, then, Congress was relaxing its own emphasis upon revenue, was issuing great quantities of military bounty warrants and scrip that sold for less than $1.25 an acre, under western pressure was graduating the price of land in proportion to the length of time it had been on the market and was moving toward a policy of free grants; at the same time the states and the railroads were attempting to extract from their grants the greatest possible return. The incongruity was apparent to few at the time.

Having pledged the income from the sale of public lands to the retirement of the war debt it was natural that the public lands should be placed under the charge of the Treasury Department (they remained there until 1849 when they were transferred to the newly established Department of the Interior, where western influences were to be much stronger). It was also natural for Congress to ask of the brilliant Hamilton a plan for the sale of the lands which was partly incorporated in the first important land act of the new government in 1796. But Congress early showed its intention of determining land policies. It had no great liking for Executive leadership, whether it came from the President, as during the Jackson administration or, at a later date, from vigorous and energetic administrators of the Land Office like John Wilson and William A. J. Sparks. Commissioners of the General Land Office who irked Congress did not last long.

Outstanding American statesmen who have had a share in shaping our land policies have held very diverse views. In addition to Hamilton, Jefferson, and Gallatin in the early period, we have Madison and Monroe expressing grave constitutional doubts as to the use of Federal power to develop internal improvements, whereas John Quincy Adams reverted to Hamilton's and Gallatin's broad latitudinarian concept of Federal powers. Jackson and Calhoun both advocated the transfer of the public lands to the states when the income from the public domain was no longer essential for the central government. Cession of the lands would remove one of the principal nationalizing forces which Calhoun so greatly feared, and would at the same time win for him a political following in the newer states. Henry Clay wanted to retain the $1.25-an-acre price and distribute the surplus income to the states on the basis of their population, a position that was liked in the older and more populous states. Thomas Hart Benton, friend of the St. Louis barons of the fur trade and of claimants to huge land grants, preferred to cheapen the price of land by graduating it in relation to the length of time it had been on the market.

In the middle period, new statesmen like Stephen A. Douglas argued that the Nation with its new acquisitions on the Pacific should be bound together by railroads which could only be built with great dona-

tions of land. Andrew Johnson, Horace Greeley, and George W. Julian favored abandoning the revenue policy and granting free homesteads to all who would go west to make farms. They were responsible for banning all speculative purchasing of land in the five southern public land states from 1866 to 1876.

What of earlier objectives of Federal land policy after the adoption of the Homestead Act? The revenue concept was not abandoned. Land already offered and great acreages to be put up at auction in the future were available for purchase in any amount at $1.25 an acre, or at less cost if depreciated bounty warrants and scrip were used. In the event that a homesteader preferred to take title after 6 months on his claim he could commute the 160-acre entry to a cash entry by paying $200. The Desert Land Act of 1877 offered settlers arid land in tracts as large as 640 acres if they would conduct water on it and pay $1.25 an acre. The Timber and Stone Act of 1878 provided for the sale of 160 acres of land for its timber or stone for $2.50 an acre. Actually, the government received far more from land sales and mineral leases after the initiation of free lands than it did before. True, the income from public lands constituted a very small percentage of the gross government revenue in contrast to the earlier years when it amounted to as much as 48 percent in one year. Revenue was no longer a major objective, though there were those like Carl Schurz who felt that a fair price in relation to value should be paid for forest land.

Veterans of the Civil War were not to be rewarded by military bounties, though there was a strong bloc which favored the revival of the bounty acts of 1847 and 1855. But since all persons, including veterans, were entitled to free homesteads if they would live upon them and develop them, the bonus of an extra quarter-section would only play into the hands of speculators, as the earlier bounty warrants had done. Veterans were given the right to homestead on 160 acres of double-minimum priced land within the primary area of railroad land grants and some were able to make something out of the soldier's additional homestead rights which came to be one of the most valuable forms of scrip and one of the most abused. Later, veterans were given preference in the selection of homesteads in reclamation projects.

Congress continued to make grants to states, with increasing liberality. Notwithstanding, the newer states after 1860 did not receive as large a proportion of their land as did Florida, Louisiana, Michigan, Wisconsin, or Arkansas which had been given their swamp and overflowed tracts by the Acts of 1849 and 1850. Furthermore, Congress was placing restrictions upon the price for which the land could be sold. In the case of the Omnibus States (Montana, North and South Dakota, Washington), the minimum price was $10 an acre. Thus while giving land directly to homesteaders the Federal government was requiring the states to withhold their place grants until they could sell at the minimum it established.

Equally difficult to reconcile with free lands were the grants to railroads. The colonization railroads advertised their lands extensively in Europe and in the older parts of the United States, and brought in many thousands of settlers to buy and develop their lands. At least one railroad recovered the full original cost of its construction from its land sales and some others did nearly as well.

To consider legislative proposals concerning the public lands, Congress first used special committees and then in 1805 the House set up a standing Committee on Public Lands and in 1816 the Senate did likewise. There seem to have been fairly close and cooperative arrangements between the General Land Office, which was

created in 1812, and the Senate and House Committees on Public Lands, though it must be said that Congress annoyed the land officials especially in the early period by continually asking for detailed statistics of lands surveyed, offered, and sold, or of collections. Essential as the information was in planning for legislation, assembling it as Congress asked, in detailed form by states and territories required that the too few clerks, already far behind in their regular work, be assigned to the task. The hope of catching up with the delivery of patents, acting upon contested entries, posting tract books and fulfilling other heavy record keeping obligations was thus further deferred. By its requests for reports Congress would blithely pile up obligations for the Land Office, but it was unresponsive when it came to voting appropriations for additional clerks and raising salaries to levels prevailing in other government agencies, so as to secure a more technically competent staff. It is tedious to read over the reports of the Commissioners of the General Land Office who for years placed as their first recommendation the need for expanding the staff and increasing salaries when there were so many other reforms that were badly needed. Yet the Commissioners were right, for better administration—and that meant abler personnel—was the first necessity.

Meantime the business of wholesale purchasing of public lands, subdividing them, laying out towns, and retailing lots and small farm tracts became one of the biggest businesses of the country and one on which many of its fortunes were founded. As population grew in the older areas and people swarmed to the new, the demand for land sent prices upward, revealing marvelous opportunities for profit by anticipating future land needs. Land speculation had been one of the early factors behind the establishment of the Colonies. Few of the founders from John Winthrop to George Washington had failed to accumulate land as an investment and few of them thought of a possible conflict of interest between their investments and the legislation or administrative practices they favored that made them possible. As the way was opened for the granting of land for canals, roads, and railroads few people saw anything wrong in favoring legislation that would enhance the value of their lands along the routes of proposed projects. Stephen A. Douglas, John Wentworth, Daniel Webster, and Samuel C. Pomeroy were just four of the members of Congress who supported legislation that promised them high returns on investments they had previously made. Those who had less capital and less political influence could anticipate the coming of settlers to their areas by buying an extra quarter-section, or at least by trying to control it through a claims association. People from high and low ranks indulged in land speculation. Not only did western settlers try to accumulate in proper and legal ways more land than they had the capital and physical energy to develop, but they were also ready to misuse the settlement laws and take advantage of their loopholes, of the dishonesty of local officers, and the cupidity of investigating agents. In some areas they were led to this type of conduct by the fact that the quantity of land they could legally obtain from the Federal government was not a large enough economic unit; in some instances they were bogus settlers acquiring land for large cattle companies or speculators.

The second of the early objectives was never discarded. Business interests in the newly developing western states were constantly trying to draw settlers to their communities and to prevent any action that might retard immigration, settlement, and development. Before 1902 many westerners had held that all public lands should be reserved for homesteaders and that none should be sold. In 1889 they had brought

about the end of unlimited sales and in 1891 they secured legislation to halt cash sales, though commutation and desert land sales were still bringing in funds to the Treasury. Now they proposed to divert practically all income from these sales into a revolving fund for the construction of dams and reservoirs to provide water for the irrigation of arid lands. Reclamation soon grew into a mighty giant bringing to the semi-arid states both a farm population and the possibility of industrial development and urban growth.

Retrospectively, critics may see that many blunders were made in legislating for the administration and disposal of the public lands. Too many laws were shaped largely in the hurly-burly of discussion on the floor of the Senate or the House with numerous amendments being added, deletions made, and words changed without careful attention to the effects of these alterations. When the differences between the versions of the two Houses were ironed out in conference and the measures reported back for final adoption, time was often short and they were too speedily approved. Hidden jokers, subtle changes in meaning, the removal of powers administrative officers needed to carry out their responsibilities effectively were not uncommon. The inflexible government price of $1.25, maintained until 1854, caused buyers to seek out only the best land. Combined with the rapid opening of new areas to purchase and settlement, the inflexible price served to scatter settlement widely, delay the coming of social institutions, and push the frontier of settlement far into the Indian country with friction and wars resulting.

Classification and appraisal of the public lands was out of the question before 1870 but thereafter some progress might have been made with more constructive leadership. Homesteading might better have been confined to areas with sufficient rainfall, but banned in the semi-arid lands west of the 102d meridian and heavily forested regions of the Upper Lakes States, the Rocky Mountains and the Pacific Coast. Settlement laws, including the Homestead, Timber Culture, and Desert Land Acts and other measures ostensibly adopted for settlers, such as the Timber and Stone Act and the Forest Lieu Act should, after an initial but short period of trial, have been amended or repealed, as all succeeding Commissioners recommended. The Preemption and the Timber Culture Acts were repealed in 1891 but Congress permitted the Timber and Stone Act to remain in operation, to the great and constant annoyance of the Commissioners. Registers, receivers, and surveyors general were responsible to the local and national political leadership which gave them their appointments, and too often if the local leaders were in the lumber business or in the livestock industry the conflicts of interest were commonly resolved in favor of the interests rather than the government. Establishment of great ownerships—partly corporate and partly individual—of timberlands, rangelands, and even farmlands were enabled, and at times there was cause for concern because the proportion of farms occupied by tenants was increasing rapidly.

Yet with all the poorly drafted legislation, the mediocre and sometimes corrupt land officials, the constant effort of settlers, monied speculators and great land companies to engross land for the unearned increment they might extract from it, the Federal land system seems to have worked surprisingly well, if we may judge by the results. Outside the cotton-growing South where the plantation system prevailed before 1860 and tenancy and sharecropping subsequently, suitable public land was being acquired by small owner operators and tenancy was less common. Disregarding the southern states, a total of 1,738,176 farms had been created in the public land states by 1880 and only in four states—California,

Oregon, Colorado, and Nevada—did the farms average over 160 acres. Of these farms 1,381,406, 80 percent of the total, were owner operated. This is good evidence that the railroad grants, the land given to endow the states, and even the speculative purchases were being divided into single family farms. Except in Illinois and Iowa, tenancy seems to have been largely the result of ownership passing from one generation to another. By 1900 the public land states, still excluding the cotton South, boasted 2,404,968 farms. 70 percent of which were owner operated. It was still possible to say, as had been even more true in 1880, that the public domain had been so disposed of as to increase the class of small landowners, as Jefferson had desired.

Before the close of the 19th century many thoughtful people became aware of the value and future significance of the natural resources still held by the Federal government and of the need for giving more attention to the methods of managing and disposing of them. This was reflected in the greater care given to the framing of new land legislation. Furthermore, although the surveyors general, registers and receivers of land offices were still a part of the patronage system as late as 1933, the emphasis upon civil service reform and the better salaries paid these employees assured a somewhat better type of official as is evidenced by the diminishing criticism of their activities. When scandals did occur they were the responsibility of men at the top, not in the lower echelons of office holders.

Another result of the greater appreciation of the value, uniqueness and diminishing amount of the public domain with its forests, wildlife, white-water streams and scenic spots, was that some people began to question whether private ownership was superior to public ownership. The rapid depletion of the standing forests in the Lake States gave rise to the fear that in a generation or less, at the then rate of cutting, supplies would become so depleted as to compel reliance on other countries. Scientific forest management as practiced abroad attracted attention. Conservation was advocated both by preservationists who wanted to lock up certain resources such as Yosemite and Yellowstone so as to prevent any exploitation of their timber, minerals, or water power and to retain these great works of nature in public ownership for future generations, and by advocates of scientific management and use of the forests, minerals, and water power. The concept of permanent reservations was difficult for many to accept. Had not America's greatness rested upon the license to exploit without government interference? Yet a number of national parks were set aside and the Act of 1891, authorizing the President to establish forest reserves on the public domain, made possible considerable progress in developing a conservation program before the end of the century.

Theodore Roosevelt brought to the conservation movement strong national leadership, a dramatic ability to interest the public, and an understanding of Presidential powers and how to use them to advance the ends he favored. Most of the western forests of today were set aside in his administration. It was Gifford Pinchot who constantly needled the President to withdraw lands for national forests, to protect the government's rights to rich coal deposits, and retain water power sites in public ownership. Roosevelt and Pinchot made a team unmatched in American history for what they preserved for future generations. Conservation became the fifth, and to many the overwhelming, objective of American land policy.

A sixth objective has become in the 20th century quite basic in determining land policy. Instead of considering the economic value of land in terms of its best use either as rangeland or for forests, for watershed

protection, recreation, preservation of wildlife, mining, industry or urban proliferation, the modern multiple-purpose objective takes all these factors into consideration and upon that broad base the future use of any particular tract may be determined.

Conservation had its advocates in all parts of the country but its support in the states in which there remained large amounts of public land was distinctly more tepid than elsewhere. Why, said West Coast lumbermen, were the public forests to be withheld from purchase and cutting when no such withholding had existed elsewhere? Why should the grazing lands be retained in Federal ownership and be managed by an agency quartered in Washington? Why should 86 percent of the entire acreage of Nevada, 66 percent of Utah, 64 percent of Idaho be retained in Federal ownership, kept off the local tax lists, the timber withheld from cutting, the rangelands denied to sheepmen or cattlemen who had no local property base, the power sites developed by public agencies and not subjected to local taxes? In the past the states had mismanaged and wastefully disposed of the Federal land which had been granted them, but in recent decades it can be argued that most of them were managing their landed property as well as the Federal government was. These western states came to think of the extensive Federal lands within their borders, reserved or withdrawn from entry, as retarding their development, slowing down their progress, and keeping them in thralldom to a remote government not capable of understanding their needs. Too often, they forgot that substantial portions of the returns from minerals, lumbering, grazing, and water power development on the public lands were either flowing into reclamation development or the building of access roads and other improvements in their section.

Finally, in appraising the American land system the question that should be asked is not whether East and West have received their proportionate share of the public domain, or the income from it, or whether the western states have been treated in an unequal and niggardly fashion in not being granted all the land within their boundaries. The questions are: (1) whether land-hungry settlers have been able to establish themselves permanently on suitable land with secure titles to farms of efficient size; (2) whether the minerals, forests, and grazing resources have been efficiently used without undue waste; and (3) whether the long-run interests of a growing Nation have been foreseen and provided for.

The public lands have come to have different levels of interest for society as it has become more mature. At one time the government was concerned only with revenue and the public mainly with surface rights to good land for farms. Later it became important first to develop, then to conserve the natural resources of the land in timber, minerals, oil, and water. Nowadays the land as living space and play space has taken on new values. Our more mobile population, in which those who are East today are West tomorrow, tends to erase sectional attitudes once important.